Court, U.S.

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No. 99-

IN THE

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in these two Age Discrimination In Employment Act cases the Ninth Circuit was correct in reversing the trial court's granting of judgment as a matter of law under Rule 50, Fed. R. Civ. P., and a new trial under Rule 59, Fed. R. Civ. P., where the plaintiffs' evidence on pretext was weak and no direct evidence was presented that Motel 6 was motivated to discriminate against plaintiffs because of their age.

2. Whether under 28 U.S.C. § 1292(b) the Ninth Circuit had jurisdiction to decide the Fennerns' interlocutory appeal where the district court had refused to find that any of the Fennerns' issues for appeal involved a controlling question of law upon which there was substantial ground for difference of opinion.

3. Whether the Ninth Circuit was correct in reversing the district court's holding that the *Fennern* and *Huttinger* cases should not have been consolidated for trial where the Ninth Circuit did not find that the district court had abused its discretion, but simply disagreed with district court's record-based reasons for finding that the consolidation had seriously prejudiced Motel 6.

CORPORATE DISCLOSURE STATEMENT REQUIRED BY RULE 29.6

The name of Motel 6 G.P., Inc. has been changed to Accor Economy Lodging, Inc. The parent corporation of Accor Economy Lodging, Inc. and Motel 6 Operating L.P. is Accor S.A.

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Motel 6 Operating L.P. and Accor Economy Lodging, Inc. ("Motel 6") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-14a; 15a; 67a-68a) are unreported. The opinions of the district court. (*Id.* at 27a-66a; 16a-26a) are also unreported.

STATEMENT OF JURISDICTION

The court of appeals' orders sought to be reviewed were entered on July 6, 1999 and on June 10, 1998. (App., *infra*, 1a-14a). The court of appeals' order denying Motel 6's petition for rehearing and suggestion for rehearing en banc was entered on September 2, 1999. (App., *infra*, 67a-68a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 623(a) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) ("ADEA") provides, in relevant part, that: "It shall be unlawful for an employer — (1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age. . . ."

28 U.S.C. § 1292(b) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which

> there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district court judge or the Court of Appeals or a judge thereof shall so order.

Section 67-5909 of the Idaho Human Rights Act provides in pertinent part:

> . . . It shall be a prohibited act to discriminate against a person . . . in any of the following and on the basis of age . . . in subsection (1)
>
> > (1) For an employer . . . to discharge . . . an individual. . . .

STATEMENT OF THE CASE

A. Background.

Motel 6, which is based in Dallas, Texas, owns and operates more than 750 budget motels throughout the United States. At the time these cases were brought, the majority of

Motel 6's motels were run by a manager and assistant manager, most often a wife and husband team. The manager had the principal responsibility for the motel. (App., *infra*, 29a, 62a; Pl. Ex. 29). An area manager, who usually had oversight responsibility for 15-20 motels, was the motel manager's immediate supervisor. Tr. 952-53, 1731. A regional vice president supervised a group of area managers in a particular geographic area. *Id.* at 1729.

For several years until their discharge on June 2, 1993, Donna Huttinger, age 55, managed the Motel 6 motel in Pocatello, Idaho, where her husband, Art Huttinger, age 68, was the assistant manager. (App., *infra*, 29a, 31a). The Huttingers were replaced by a manager who was 43 and an assistant manager who was 45. *Id.* at 31a.

For about six months until their discharge on January 18, 1994, Delores Fennern, age 58, managed the Motel 6 motel in Idaho Falls, Idaho, where her husband, James Fennern, age 60, was the assistant manager. (App., *infra*, 29a, 31a). The Fennerns were replaced by a manager who was 49 and an assistant manager who was 35. *Id.* at 31a.

The Huttingers' and Fennerns' area manager was Doug Massman, age 60. Tr. 941. Scott Griffith was the Motel 6 regional vice president with supervisory authority over the Fennerns' and Huttingers' motels. *Id.* at 1729.

B. Proceedings Below.

The Fennerns and Huttingers brought separate actions in federal district court in Pocatello, Idaho against Motel 6 alleging that they were discharged because of their age. The

Fennerns alleged that Motel 6 had violated the ADEA and the Idaho Human Rights Act ("IHRA"). The Huttingers brought their case under the IHRA.[1] On February 18, 1997, the district court (Winmill, J.) consolidated the two cases for trial. (App., *infra*, 29a-30a).

After a 10-day trial, the jury returned a verdict in favor of the Huttingers, awarding them front and back pay and punitive damages under the IHRA. The jury also returned a verdict in favor of the Fennerns, awarding them front and back pay and liquidated damages under the ADEA. Thereafter, Motel 6 moved in both cases for judgment as a matter of law (JAML) or, in the alternative, for a new trial. (App., *infra*, 30a).

On January 20, 1998, the district court granted Motel 6's JAML motion in the *Huttinger* case and conditionally granted Motel 6's new trial motion in that case if the district court's JAML holding did not survive appeal (App. *infra*, 65a). In the *Fennern* case, the district court granted Motel 6's new trial motion on the basic ADEA violation. *Id.* In that case, the district court also granted Motel 6's JAML motion on the issue of whether Motel 6 had committed a willful violation of the ADEA, and conditionally granted Motel 6 a new trial on that issue in the event that its JAML holding did not survive appeal. *Id.*

The Fennerns petitioned the district court pursuant to 28 U.S.C. § 1292(b) to certify their case for an interlocutory appeal. (App., *infra*, 20a). The Huttingers moved for certification of their case pursuant to Rule 54(b), Fed. R. Civ. P. *Id.* at 18a. Motel 6 opposed the Fennerns'

1. The Huttingers and Fennerns had other claims that did not survive summary judgment. (App., *infra*, 29a-30a).

petition but not the Huttingers'. *Id.* On May 13, 1998, the district court granted the Fennerns' petition and the Huttingers' motion. *Id.* at 26a. The Fennerns thereupon petitioned the court of appeals pursuant to 28 U.S.C. § 1292(b) to hear their interlocutory appeal. *Id.* at 15a. Motel 6 opposed the Fennerns' petition. On June 10, 1998, the court of appeals granted the Fennerns permission to appeal their case. *Id.*

On July 6, 1999, in an unpublished order, the court of appeals (Judges B. Fletcher, Reinhardt, and Thomas) reversed the district court in both cases and reinstated the jury verdicts (App., *infra*, 1a-14a). Motel 6's petition for rehearing and suggestion for rehearing en banc was denied on September 2, 1999. *Id.* at 67a-68a.

C. Facts And District Court Findings.

1. *The Huttingers.*

The Huttingers were discharged for: (1) discrimination against Native Americans; (2) violations of Motel 6's safety and security policy; and (3) widespread employee complaints. (App., *infra*, 34a).

While the Huttingers were on vacation, the relief manager at the motel the Huttingers managed, Aileen Malone, contacted area manager Massman concerning Malone's discovery that the Huttingers were discriminating against Native Americans. (App., *infra*, 46a, 48a). Massman initially discussed the matter with regional vice president Griffith. Tr. 1079. Griffith directed Massman to go immediately to the Huttingers' motel and conduct an

investigation. *Id.* Massman proceeded to interview employees who had been required by the Huttingers to carry out the Huttingers' discriminatory policies against Native Americans. *Id.* at 1080-82. Massman then reported back to Griffith that his investigation revealed the Huttingers were in fact discriminating against Native Americans. *Id.* at 1085-88. At that point, Griffith and Massman decided to discharge the Huttingers. *Id.* After their return from vacation, Massman met with the Huttingers and, during a face-to-face meeting, informed them of their discharge. *Id.* at 1091-92.[2]

The district court found that the Huttingers did not rebut record evidence that their memoranda for desk clerks that discriminated against Native Americans was still in effect three years after their previous area manager, Bob Williams, instructed them to cease using it. (App., *infra*, 47a-50a). The memoranda instructed desk clerks to check the identification of prospective Native American guests more closely than that of other prospective guests. *Id.* at 47a. One memorandum referred to "people who are indians [sic] or look questionable." *Id.* The district court observed that relief manager Malone testified that: (1) she discovered copies of a discriminatory memorandum in the desk clerk training file and forwarded it to Area Manager Massman; and (2) additional copies were located in desk clerk Jenson's personnel file. *Id.* at 48a. The fact that Jenson's name appeared on the second page of this memorandum provided "compelling evidence" that the memorandum was still being used to discriminate since Jenson had started work in 1993, only one month before the Huttingers were discharged. *Id.* The district court noted that Jenson testified that Donna Huttinger had required Jenson to sign the memorandum and

2. The Huttingers actively attempted to persuade Massman to change his mind. Ex. 75.

had guided Jenson's hand while she did so. *Id.* at 49a. The memorandum introduced into evidence bore the notation "Teresa Jensen TJ." *Id.* at 48a. The district court observed that Donna Huttinger had testified that this notation was in her own handwriting. (App., *infra*, 49a). The district court also noted that Malone[3] and Jenson had both given unrebutted testimony that desk clerks at the Pocatello Motel 6 were required to obtain the approval of the manager before renting a room to a Native American, and that Jenson had been reprimanded by Donna Huttinger for failing to do so. *Id.* at 49a. The district court observed that Malone and Jensen were not employed by Motel 6 at the time of the trial and were thus disinterested witnesses.[4] *Id.* at 47a fn. 14.

The district court found that at trial the Huttingers admitted that they had authored the discriminatory memoranda, but Donna Huttinger denied that the memorandum specifically referring to "indians" was in use after 1990, although she admitted that it was retained in her files. (App., *infra*, 47a-48a). Ms. Huttinger did not explain how Jensen's signature came to be on the memorandum and did not rebut Malone's and Jensen's testimony concerning the current application of the discriminatory policy against Native Americans, although she and Art Huttinger had the opportunity to do so on rebuttal. *Id.* at 49a.

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3. In parts of the discussion of the Huttingers' discrimination, the district court inadvertently substituted "Geiger," the relief manager at the Fennerns' motel, for "Malone." (App., *infra*, 48a-49a).

4. At the time of the trial, Malone was employed as a school bus driver. Tr. 1354-55. Neither she nor her husband was employed by Motel 6. *Id.* Jensen also had no connection with Motel 6 at the time of the trial. Tr. 1557.

The district court concluded that no reasonable jury could have found that: 1) the Huttingers' discrimination policy had been abandoned in 1990; 2) Motel 6 did not consider such discrimination serious enough to warrant discharge; 3) Motel 6 did not discharge the Huttingers in part for this reason. (App., *infra*, 49a-50a). Thus, the district court emphasized that the Huttingers' policies with respect to Native American guests were "flagrant violations of the law and of Motel 6 policy." *Id.* at 50a.

The district court also observed that Donna Huttinger admitted to several security violations and Art Huttinger acknowledged that Regional Vice President Griffith had warned him four months before his discharge about Huttinger's failure to utilize "blue tags," a violation of the "key control" and safety policy. (App., *infra*, 50a-51a).[5]

The district court noted that Aileen Malone had testified that, shortly after the Malones began working as relief managers, while the Huttingers were on vacation, several Motel 6 employees submitted oral and written complaints about the Huttingers that Malone passed on to Massman before Massman recommended that the Huttingers be discharged. (App., *infra*, 52a). Judge Winmill observed that Art Huttinger did not dispute that he had ordered Motel 6 employees to work on the Huttinger's personal motor home. *Id.* Donna Huttinger admitted that this was a Motel 6 policy violation. *Id.* The district court also observed that a former area manager and Huttinger witness, Joe Demarest, testified

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5. The court of appeals found that Massman "never divulged" to the Huttingers the room key violations he found on his first inspection (App., *infra*, 4a). In fact, Art Huttinger admitted at trial that Massman had discussed the blue tag violation with him during Massman's first inspection. Tr. 810-11.

that this violation constituted grounds for discharge. *Id.* The Huttingers did not introduce any direct evidence that they were discriminated against on the basis of age. (App., *infra*, 36a).

The district court concluded that each of Motel 6's proffered reasons for discharging the Huttingers had an independent basis in fact and none was so far-fetched as to give the impression of being manufactured to hide "an unspoken motive." (App., *infra*, 54a)[6] Accordingly, the district court concluded that Motel 6 was entitled to JAML. *Id.* at p. 54a. The district court found that if its JAML finding did not survive appeal, the court would conditionally grant a new trial in the *Huttinger* case. *Id.* at 57a-58a.

2. *The Fennerns.*

The Fennerns took over management of the Idaho Falls motel about six months before their discharge. (App., *infra*, 40a). At the time the Fennerns assumed responsibility for the motel, it was filthy, and the Fennerns were asked to bring it up to Motel 6 cleanliness standards. *Id.* Six months later, as part of their regular inspection program, Massman and Griffith inspected the Fennerns' motel while the Fennerns were on vacation. Tr. 1135. The motel failed that inspection, mainly because the motel was insufficiently clean to meet Motel 6 standards.

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6. The district court observed that the jury could not have reasonably disbelieved Motel 6's proffered reasons based on the similarities in the two cases (*e.g.*, proximity of the discharges to the plaintiffs' vacations) because of the seriousness of the violations of Motel 6 policy and the fact that at about the time Massman and Griffith discharged the Huttingers, they granted the Fennerns a transfer to a more manageable motel. (App., *infra*, 53a fn. 17).

(App., *infra*, 39a). Twelve days later, after the Fennerns returned from vacation, Massman held a face-to-face meeting with them where he informed them they were discharged. Tr. 180, 413.

The Fennerns were discharged for: (1) failing a motel inspection; (2) improperly checking references before hiring a desk clerk; and (3) leaving for vacation with Room 114 at their motel "down" (unrentable). (App., *infra*, 39a). The district court observed that there was no dispute that the Fennerns failed to meet Motel 6's cleanliness standards, and that Massman and Griffith had a reasonable basis for concluding that six months was adequate to meet those standards, especially with the Fennerns' more than 10 years of management experience. *Id.* at 58a-59a. The district court found that at the "leisurely rate of one room per day, the Fennerns could have completed the task within three months." *Id.* at 60a.

The district court also found that Motel 6 presented "convincing testimony to rebut" the Fennerns' pretext evidence (App., *infra*, 59a): A purchase requisition showed that the Fennerns received more supplies than they admitted. Delores Fennern admitted having a carpet shampooer with which she could have cleaned four rooms per day, and that using that shampooer, "the 80-room motel could have been cleaned within a month." *Id.* Finally, Loree Shearouse, who succeeded Delores Fennern as manager, thoroughly cleaned the motel in six months, despite her lack of experience. *Id.* at 28. Thus, the court concluded that the jury was mistaken in disbelieving that Motel 6 discharged the Fennerns in part for failing the motel inspection. *Id.* at 60a.[7]

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7. The only direct evidence introduced by the Fennerns that Motel 6 intended to discriminate against them because of their age (Cont'd)

The district court observed that even if the Fennerns' evidence of pretext had been more compelling, the jury made a mistake in inferring the ultimate fact of age discrimination. (App., *infra*, 62a). The district court found that any inference of age discrimination is "quite weak" when a 58-year old manager (Delores Fennern) is replaced by a 49-year old manager (Loree Shearouse). *Id.* The district court noted that, as manager, Delores Fennern bore the primary responsibility for the perceived performance deficiencies as the highly-compensated half of the management team. *Id.*[8] In these circumstances, the district court found, the evidence of pretext must be much stronger. *Id.* Accordingly, the district court concluded that the Fennerns did not prove that age discrimination was the real reason for their discharge and that Motel 6 was entitled to a new trial. *Id.*

The district court also found that Motel 6 was "severely prejudiced" by the consolidation of the *Fennern* and *Huttinger* cases for trial for two reasons. (App., *infra*, 63a). First, Plaintiffs had represented to the court they would put in evidence of a pattern and practice of age discrimination. *Id.* On that basis, the district court permitted consolidation.

(Cont'd)
were comments made on two occasions by Massman that he could replace the Fennerns with college students at a lower wage. (App., *infra*, 36a). The district court observed that Jim Fennern admitted the statements were made at least six months before the Fennerns were discharged. *Id.* The district court concluded that these "passing remarks" were insufficient direct evidence of Motel 6's intent to discriminate. *Id.*

8. Documentary evidence in the record shows that the manager was solely responsible for running the motel; the assistant manager was little more than a desk clerk. Pl. Ex. 29. *See* App., *infra*, 56a fn. 20.

Id. Later, just before trial, Plaintiffs announced that they did not intend to introduce pattern and practice evidence. (App., *infra*, 30a). In their closing argument to the jury, however, the Plaintiffs contended that the two cases presented the same pattern of Motel 6 conduct. Tr. 2071. On Motel 6's new trial motion, Judge Winmill held that, without this pattern and practice evidence, the cases were "insufficiently similar to justify joinder." (App., *infra*, 63a). Noting the "substantial differences" in the reasons for the discharges of the two couples, the district court found that the similarities between the cases "pale by comparison. . . ." *Id.*

Secondly, upon learning that the Plaintiffs abandoned their pattern and practice case, the district court refused to permit Motel 6 to introduce statistical evidence on its hiring and discharge patterns to demonstrate there was no statistical support for any practice of age discrimination. (App., *infra*, 64a). The district court found that this ruling led to the "unforeseen" result that plaintiffs argued a pattern to the jury based on their two cases that Motel 6 could not rebut with statistics. *Id.* The district court concluded that: "Motel 6 was clearly prejudiced by this unintended result." *Id.*

D. The Court Of Appeals Decision

The court of appeals reversed the district court in both cases (App., *infra*, 13a-14a). With respect to the Huttingers, the court of appeals relied on plaintiffs' contentions that: (1) area manager Massman, who terminated the Huttingers, held the area manager position for one month before he

discharged the Huttingers; (2) Massman conducted "surreptitious" inspections; (3) Massman never reviewed the Huttingers' personnel files; and 4) Massman never inquired about the Huttingers' alleged discriminatory policies before terminating them (App., *infra*, 9a). Without explanation or elaboration, the court concluded that a conditional new trial should not have been granted because the jury's verdict was not against the clear weight of the evidence. *Id.* at 10a.

The court of appeals found that the district court had erred also in comparing only the relative ages of the property managers to find a weak inference of age discrimination. (App., *infra*, 11a). The court noted that manager and assistant manager were hired as teams, not individuals. *Id.*

The court of appeals summarily rejected the district court's findings with respect to the Fennerns. (App., *infra*, 11a). The court observed that Motel 6 had hindered the Fennerns' ability to clean their motel after they took over and that the relief managers were responsible for motel cleanliness in the Fennerns' absence. *Id.* The court concluded that the Fennerns were discharged because of their age. *Id.*

The court of appeals also concluded that the district court had erred in granting a new trial on the basis that the cases should not have been consolidated. (App., *infra*, 11a). The panel gave three reasons for its conclusion: (1) each case involved "similar allegations" against the motel managers; (2) the cases had the same "pattern of furtive inspections";

and (3) the inspections were followed by "instant terminations" in both cases. *Id.*

Motel 6's petition for rehearing and suggestion for rehearing en banc was summarily denied. (App., *infra*, 67a-68a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT RECENTLY GRANTED REVIEW OF A DECISION FROM THE FIFTH CIRCUIT PRESENTING THE SAME QUESTION AS IN THIS CASE — WHETHER A PLAINTIFF ALLEGING AGE DISCRIMINATION CAN SURVIVE JAML (OR A NEW TRIAL MOTION) WHERE THE PLAINTIFF'S PRETEXT EVIDENCE IS WEAK AND THERE IS NO DIRECT EVIDENCE THAT THE DEFENDANT WAS MOTIVATED TO DISCRIMINATE AGAINST THE PLAINTIFF BECAUSE OF AGE.

On November 8, 1999, this Court granted review in No. 99-536 of an unpublished decision from the Fifth Circuit in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 98-60334 (5th Cir., decided April 22, 1999). In that ADEA case, the Fifth Circuit found that the district court erred in not granting JAML for defendant Sanderson where Sanderson had discharged Reeves allegedly for timekeeping errors. Petition for ertiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (filed Sept. 15, 1997 at Appendix A, p. 3a). There was evidence in that case that one of Sanderson's three decisionmakers had remarked to Reeves several months before his discharge that Reeves was so old he "must have come over on the Mayflower" and that Reeves

was "too damn old to do the job." *Id.* at 6a. The Fifth Circuit held, however, that because Reeves failed to offer evidence sufficient to prove that Sanderson's reason for discharging him was untrue and that age is what really triggered Reeves' discharge, Sanderson was entitled to JAML. *Id.* at 7a. The principal question upon which this Court granted Reeves' petition for certiorari was:

> Under the Age Discrimination in Employment Act, Is Direct Evidence of Discriminatory Intent Required to Avoid Judgment as a Matter of Law for the Employer?

On this question, the petition for certiorari observed that the circuit courts were split. Petition for Certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, at pp. 4-6. Compare *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 360 (1st Cir. 1994) and *Theard v. Glaxo, Inc.*, 47 F. 3d 676, 680 (4th Cir. 1995) with *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224-25 (2nd Cir. 1994); *Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061, 1069 (3d Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1994); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

In the instant case, the Ninth Circuit reversed the district court's ruling granting JAML (and a conditional new trial) in *Huttinger*, and a new trial in *Fennern*, despite that the evidence in the record showed that Motel 6's reasons for discharging the Huttingers and Fennerns were not pretextual and in the absence of direct evidence that Motel 6 was motivated to discharge the Huttingers and Fennerns because of their age.

The *Reeves* case and this case thus present the same issue of the nature of the evidence an ADEA plaintiff must introduce to avoid JAML. Accordingly, the Court should decide this case together with the *Reeves* case or, at minimum, hold this case pending its decision in the *Reeves* case.

The court of appeals rejected the district court's findings in the *Huttinger* case in part on the basis that Malone and Jenson were not disinterested witnesses because Malone took over the Huttingers' managerial role after they were terminated, and because Jenson was a disgruntled employee (App., *infra*, 9a). In fact, the Malones and Jenson had left Motel 6 long before the trial. Tr. 1354-55; 1557. And the mere fact that a defense witness once worked for the defendant cannot alone be a basis for discrediting that witness. *See Chesapeake & Ohio Ry Co. v. Martin*, 283 U.S. 209, 216 (1931); *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 343 (1933). That a witness may not like a plaintiff because of bad things the plaintiff did to her is certainly not a basis for a court of appeals to ignore the witness' testimony.

Significantly, the court of appeals did not address the Huttingers' failure to explain away the Huttingers' discriminatory policy memorandum that contained Jenson's handwritten name, corroborating Malone's and Jenson's testimony that Huttingers continued to discriminate against Native Americans until the Huttingers left for their vacation. Their general denial that their discriminatory policy was still in effect was insufficient to overcome this specific evidence of discrimination. *See Billings v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1303 (7th Cir. 1991); *Irvin v. Airco Carlode*, 837 F.2d 724, 726 (6th Cir. 1987); *Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir. 1998).

The court of appeals also relied on the fact that Massman had held his position for less than a month before he terminated the Huttingers and "never inquired about the Huttingers' alleged discriminatory policies before terminating them. . . ." (App., *infra*, 9a). In fact, the decision to terminate the Huttingers was made by Griffith, an experienced executive, and Massman together. Tr. 920-21, 1079-1080. All the record evidence shows that before discharging the Huttingers, Massman obtained their discriminatory policy memoranda and interviewed employees at the motel, at Griffith's direction. Tr. 1079-82, 1091-92.

The court of appeals acknowledged that Motel 6 may have had valid reasons to discharge the Fennerns for not keeping their motel clean (App., *infra*, 10a). The court of appeals reversed the district court's new trial holding because there was "ample evidence" Motel 6 hindered the Fennerns' ability to clean the motel (they claimed not to have the new equipment they needed) and that the "Fennerns were fired because of their age." (App., *infra*, 11a). The district court relied however, on the fact that documentary evidence showed the Fennerns actually received more supplies than they initially claimed, and that even with the old equipment they had at the motel they could have cleaned their motel in a month (App., *infra*, 59a). There was no direct, probative evidence that the Fennerns were discharged because of their age. *Id.* at 36a.

Thus, in reversing the district court, the court of appeals in the *Huttinger* and *Fennern* cases was relying on the plaintiffs' weak evidence to prove pretext without any direct evidence that Motel 6 was motivated to discriminate against them because of their age. The issue is thus the same as that presented in the *Reeves* case.

II. THE CIRCUIT COURT IMPROPERLY GRANTED THE FENNERNS' 28 U.S.C. § 1292(b) PETITION IN THE ABSENCE OF A DISTRICT COURT FINDING THAT THE CASE PRESENTED A CONTROLLING QUESTION OF LAW AS TO WHICH THERE WAS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

While certifying the case for appeal, the district court specifically found that there was *not* a substantial ground for a difference of opinion on any controlling issue of law. (App., *infra*, 21a, 25a). Under 28 U.S.C. § 1292(b), a district court cannot certify a case for appeal unless it first affirmatively finds that "there is a controlling question of law as to which there is substantial ground for difference of opinion. . . ." That indeed is the view of the Seventh and Eighth Circuits. *See Union Oil Co. of California v. John Brown E&C*, 121 F.3d 305, 311 (7th Cir. 1997); *Bullock v. Baptist Memorial Hospital*, 917 F.2d 58, 59-60 (8th Cir. 1987); *Lerner v. Atlantic Richfield Co.*, 690 F.2d 203, 209 (Temp. Emer. Ct. of App. 1982) (dicta). Accordingly, the district court should not have certified the case for an interlocutory appeal and the court of appeals did not have jurisdiction to consider the appeal. Moreover, the district court's reliance on judicial economy and party fairness do not meet the stringent requirements applied by this Court and in other circuits for appealing the nonfinal order in this case. The question presented here is one of considerable importance in the Court's consideration of the appropriate

procedures for appellate review and the potential for abuse of the interlocutory appeal process.

A. The District Court's Order of Certification.

In its Order of Certification, the district court considered each of five legal issues that the Fennerns contended involved a controlling question of law upon which there were substantial grounds for difference of opinion. The district court refused to certify the case on the basis of any of these issues (App., *infra*, 21a-24a). Only as to the third assignment of error — whether the district court was permitted to examine the inference of discrimination drawn by a jury — did the court find that there was substantial ground for difference of opinion. *Id.* at 22a. The court found, however, that "the result did not turn on this question of law." *Id.* In other words, the issue was not dispositive in this case. Accordingly, the district court stated it was "reluctant" to certify its ruling on that issue. *Id.* at 22a. The district court concluded that it viewed "an interlocutory appeal of any individual question of law to be unwarranted. . . . (App., *infra*, 25a)"

The district court nonetheless decided that, as a matter of judicial economy and fairness to the litigants, the Fennerns should be permitted to take an interlocutory appeal. *Id.* The court noted that it had granted Motel 6 judgment as a matter of law on the willful violation issue — one of those which Plaintiffs sought to appeal — and that the willfulness question would not be submitted to the jury at the second trial. *Id.* at 24a. The court reasoned that if an interlocutory appeal was not permitted now a "disturbing result" might occur after the second trial. *Id.* at 24a-25a. The court of appeals might affirm the new trial order but order a new trial

on the willful violation issue, thus requiring a time-consuming third trial. *Id.* The district court concluded that this possible result "favors allowing an immediate appeal." *Id.* Accordingly, the district court certified the case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 26a.

B. The Court of Appeals' Decision.

Over Motel 6's opposition, the court of appeals, in a one-sentence order, granted the Fennerns permission to appeal pursuant to 28 U.S.C. § 1292(b). (App., *infra*, 15a).

C. The Court of Appeals Did Not Have Jurisdiction to Hear the Fennerns' Appeal.

Section 1292(b) provides a mechanism by which litigants can take an immediate appeal of a nonfinal order upon the consent of both the district court and the court of appeals. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26 (9th Cir. 1982). Before accepting an interlocutory appeal, a court of appeals must first determine whether the district court has properly found that all the certification requirements of the statute have been met. *Id.* The second of these requirements is that there be a substantial ground for difference of opinion on a controlling question of law. 28 U.S.C. § 1292(b). In the absence of a district court finding that there is substantial ground for difference of opinion on a controlling question of law, a court of appeals does not have jurisdiction to entertain a petition under Section 1292(b). *Id. See Union Oil Co. of California v. John Brown E & C*, 121 F.3d 305, 311 (7th Cir. 1997) (appeal granted only if district court believes an issue involves a controlling question of law as to which there is substantial ground for difference of opinion and "says so in writing. . . ."); *Bullock*

v. Baptist Memorial Hospital, 917 F.2d 58, 59-60 (8th Cir. 1987) (district court reliance on fact that immediate appeal will enable court to hear action against all defendants at one time and in one forum does not confer jurisdiction on court of appeals under § 1292(b) in absence of district court finding that there is a controlling question of law on which there is substantial ground for difference of opinion); *Lerner v. Atlantic Richfield Company*, 690 F.2d 203, 209 (Temp. Emer. Ct. of App. 1982) (dicta).

In our case, the district court specifically found that there was no controlling issue of law on which there was substantial ground for difference of opinion under Section 1292(b). Thus, the jurisdictional prerequisite for a petition to the court of appeals had not been met and the Fennerns' petition should have been dismissed. The district court could not escape this jurisdictional requirement by relying solely on judicial economy and fairness to the litigants. There is no precedent for such an approach.[9]

D. The Court's Findings On Judicial Economy and Party Fairness In Any Event Do Not Satisfy The Stringent Requirements Under Section 1292(b).

Assuming for argument's sake that a district court's finding that judicial economy and party fairness might serve

9. The district court's case, *Katz v. Carte Blanche Corp.*, 496 F.2d 744, 755 (3d Cir. 1974) does not stand for the proposition that it may ignore the statutory requirement that there be substantial ground for difference of opinion on a controlling question of law, if it simply finds that an immediate appeal will serve judicial economy and party fairness. Thus, in *Katz*, the district court had specifically found that the 1292(b) criteria had been met. *Id.* at 752. The court of appeals merely observed that avoidance of wasted trial time and litigation expenses is a policy favoring interlocutory appeal that may impact on the controlling-question-of-law issue.

as an independent ground for certification under Section 1292(b), a proposition we strongly dispute, Motel 6 submits that the district court's findings fell far short of meeting the very high standard for appealing a nonfinal order.

The party seeking to appeal a nonfinal order has the burden of demonstrating that "*exceptional circumstances* justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (emphasis added), quoting from *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972). *See*, the Ninth Circuit's decision in *In re Cement Antitrust Litigation, supra*, 673 F.2d at 1026, observing that the legislative history of § 1292(b) revealed that: ". . . this section was to be used only in *exceptional situations* in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.* (emphasis added). The "exceptional case" doctrine applies to orders granting new trials. *See Massey v. Gulf Oil Corp.*, 508 F.2d 92 (5th Cir. 1975); *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 n.2 (5th Cir. 1982); *Nebel v. Avichal Enterprises, Inc.*, 125 F.R.D. 415, 420 (D. N.J.).

The district court relied on the fact that resolution of the willfulness issue might have avoided a third trial later. (App., *infra*, 24a-25a). The same could be said, however, of many evidentiary issues involving a district judge's exclusion of documentary evidence or testimony at the first trial. That evidence would be excluded at the second trial, but we know of no cases that hold that an evidentiary question of that sort constitutes exceptional circumstances warranting an

interlocutory appeal. *See Steele v. Wiedmann Machine Company*, 280 F.2d 380, 383-384 (3rd Cir. 1960).

Section 1292(b) is not a vehicle for piecemeal appeals, and there was no basis for going that route here. The court of appeals should have denied the Fennerns' petition. It did not have jurisdiction to hear the case.

Since the court of appeals used the facts in the *Fennern* case for its reversal of the district court's finding that the two cases were improperly consolidated, the court of appeals' decision on the consolidation question must be reversed.

III. THE COURT OF APPEALS FAILED PROPERLY TO APPLY AN ABUSE OF DISCRETION STANDARD TO THE DISTRICT COURT'S FINDING THAT THE CASES WERE IMPROPERLY CONSOLIDATED.

Without finding that the district court had abused its discretion, the court of appeals reversed the district court's granting of a new trial in the *Fennern* case for the additional reason that the *Fennern* and *Huttinger* cases should not have been consolidated for trial and that Motel 6 was seriously prejudiced thereby. (App., *infra*, 11a). The question of the standard for appellate review to be applied where a district court decides after the verdict in a civil case that a defendant was prejudiced by the consolidation of two insufficiently related cases appears to be one of first impression. The issue is nonetheless an important one in the federal appellate review process. Here, the court of appeals has simply substituted its judgment for that of the district, and did so after misstating the record in two crucial respects.

Unless the trial court has abused its broad discretion, a reviewing court may not overturn a trial court's refusal to consolidate cases for trial. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). If the trial court's initial decision is reviewed for an abuse of discretion, the trial court's later decision, finding that the consolidation resulted in serious prejudice to the Defendants, should be judged by the same standard. Under that standard, a reviewing court may not simply substitute its judgment as to the weight of the evidence for that of the trial judge. If the district court's account of the evidence is plausible in light of the evidence viewed in its entirety it must be affirmed.

In the instant cases, the district court relied in significant part on the "substantial differences in the reasons for discharges" between the Huttingers and Fennerns, finding that the similarities regarding age differentials and the temporal proximity of the discharges to their vacations in both cases "pale by comparison" and were inconsequential. (App., *infra*, 63a).[10] In reversing the district court, the court of appeals relied on the following: "[E]ach case involved similar allegations against the same Motel 6 managers, and the same patterns of furtive inspections followed by instant terminations." *Id.* at 11a. Obviously, there is a direct conflict between the district court's finding that the reasons given for the discharges were substantially different and the court of appeals' finding that the reasons involved "similar allegations." In these circumstances, under an abuse-of-discretion standard, or even under a stricter standard of review, the panel should have explained why the district

10. Notably, the district court found that, at the same time that Massman and Griffith were discharging the Huttingers, they granted the Fennerns' request to move to a smaller, more manageable motel in Idaho Falls. (App., *infra*, 53a fn.17).

court's "substantial differences" finding was not supported in the record. The court of appeals did not do so. There is absolutely no record of evidence to support the proposition that the reasons for the discharges in the two cases were "similar" or even overlapped at all. In fact, the record evidence demonstrates that the reasons for the discharges in the two cases were quite different, as the district court found. *See supra* at pp. 5, 10 and App., *infra*, 34a, 39a.

There is also no record evidence to support another of the court of appeals' findings of similarities in the two cases: "the same pattern of furtive inspections. . . ." (App., *infra*, 11a). Massman went to the Huttingers' motel to investigate the relief manager's and employees' specific complaints of discrimination by the Huttingers, a most serious matter whose resolution he and Griffith rightly concluded should not wait until the Huttingers' return. App., *infra*, 46a, 48a; Tr. 1079, 1080-82. In contrast, after instructing the Fennerns six months earlier to clean up their motel, Massman and Griffith returned for a regular inspection, not in response to any complaints. Tr. 1135. The "pattern" was not the same in the two cases. Since the two cases were quite dissimilar in the most important respects, the court of appeals was also not entitled to rely on inconsequential "similarities" in the cases to reject the district court's finding that Motel 6 was severely prejudiced by the district court's decision to preclude Motel 6's statistical evidence on age discrimination complaints. In sum, the court of appeals had no significant basis for finding that the district court's decision to grant a new trial because the cases were wrongly consolidated was an abuse of discretion or was otherwise incorrect.

CONCLUSION

For the foregoing reasons, the Court should grant Motel 6's petition for certiorari in these cases and reverse the court of appeals rulings on the issues presented in these cases.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 6, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35533
D.C. No. 95-CV-262-BLW

ART HUTTINGER, HUSBAND, AND
DONNA HUTTINGER, WIFE

Plaintiffs – Appellants,

v.

MOTEL 6 OPERATING LP; MOTEL 6 GP, INC.,

~~Defendants – Appellees.~~

No. 98-35608
D.C. No. 95-CV-121-BLW

JAMES FENNERN, HUSBAND, AND
DELORES FENNERN, WIFE

Plaintiffs – Appellants,

v.

MOTEL 6 OPERATING LP; MOTEL 6 GP INC.;
JOHN DOES, 1-4,

Defendants – Appellees.

Appendix A

ORDER

Argued and Submitted March 9, 1999
Seattle, Washington

Consolidated appeals from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted March 9, 1999
Seattle, Washington

Before: B. FLETCHER, REINHARDT, and THOMAS, Circuit Judges.

Art and Donna Huttinger and James and Delores Fennern, former managers at Motel 6 motels, appeal the district court's reversal of jury verdicts in their favor in their consolidated age discrimination actions against Motel 6. Both couples were discharged by Motel 6 after the same company officials inspected their motels while they were away on vacation. Both were replaced by younger, less experienced husband and wife management teams that received substantially lower wages.

After the jury returned verdicts favorable to both plaintiffs, the district court granted judgment as a matter of law against the Huttingers, and in the alternative, a new trial. The court denied judgment as a matter of law to Motel 6 in the Fennern case, but granted a new trial. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse. We reinstate both jury verdicts.

Appendix A

The Huttingers

Art and Donna Huttinger managed a Motel 6 in Pocatello, Idaho, and had managed motels for Motel 6 from 1985 until their termination in 1993. At the time of their discharge, Art was sixty-eight years of age and Donna was fifty-five. They had always received satisfactory evaluations, and Donna, as manager, received merit pay increases for each year of employment. A former area manager testified that the Huttingers were among the best managers he had.

Motel 6 insists that one of the reasons for the discharge was the Huttingers' discrimination against Native Americans. There are several Native American reservations near the Pocatello Motel 6. The Huttingers contend that the motel is plagued with prostitution and alcohol-related problems and frequented by drunk locals who destroy the rooms. To minimize those problems, the Huttingers maintained a no-rent list of problematic customers. Motel 6 obtained a copy of a discriminatory rental policy that the Huttingers testified they had ceased using in 1991. The parties dispute how Motel 6 obtained the policy statement. A desk clerk, Theresa Jensen, who apparently did not get along well with Donna Huttinger, testified that a discriminatory policy was in effect when she worked at the motel and that she was reprimanded for not seeking manager approval of "Indians."

When the Huttingers were away on vacation in May 1993, Aileen and James Malone ran the motel as relief managers. Aileen contacted the new area manager, Doug Massman, to report employee unrest. Massman, who had inspected the motel in the two weeks prior to Aileen's call,

returned to the motel for another inspection in the Huttingers' absence. Motel 6 insists that the employees spontaneously reported their dissatisfaction with the Huttingers. Massman fired the Huttingers when they returned from vacation on June 2, 1993, without any warning. He alleged that they had violated a company policy as to how they handled room keys, a violation he claims to have discovered in his first inspection but never divulged to the Huttingers. He also asserted that the Huttingers maintained an unlawful policy of discriminating against Native Americans. Massman did not give the Huttingers an opportunity to respond to the allegations. He never reviewed their personnel files before terminating them.

The Malones replaced the Huttingers as managers. Aileen was forty-three and James was forty-five at that time. Aileen wanted Motel 6 to employ her in Idaho so that she could be closer to her family. The Malones received lower salaries. Motel 6 had paid Donna Huttinger $660.16 biweekly, but paid James Malone only $376.40. Art Huttinger had received an hourly wage of $4.25 per hour, the same wage Motel 6 paid to Aileen Malone.

The Huttingers filed a claim under the Idaho Human Rights Act ("IHRA"), Idaho Code § 67-5901 *et seq.*[2] The jury returned a verdict in favor of the Huttingers, finding that age was a motivating factor in their termination and that Motel 6 had willfully violated the statute. The jury awarded Art Huttinger $45,307.20 in back pay, $1,826.80 in front

2. Because they failed to timely file an EEOC complaint, they were precluded from bringing a claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

pay, and $1,000 in punitive damages under the Idaho Human Rights Act, for a total judgment of $48,134. The jury awarded Donna Huttinger $76,087.20 in back pay, $2,729.80 in front pay, and $1,000 in punitive damages for a total award of $79,817.

Post trial, the district court granted judgment as a matter of law in favor of Motel 6, and in the alternative, a new trial, on the issues of liability and willfulness of the violation. The district court certified its order granting judgment as a matter of law as a final appealable judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Huttingers timely appealed.

The Fennerns

James and Delores Fennern managed a Motel 6 in Idaho Falls, Idaho, and had managed motels for Motel 6 since 1981. They took over a filthy facility and were made responsible for cleaning it up. In December 1993, Massman and Scott Griffith, another supervisor, inspected the Fennerns' motel while the Fennerns were on vacation. Massman and Griffith noted several violations, mostly involving the cleanliness of the motel. At trial, the staff explained that Massman had insisted on getting his room immediately, before they had a chance to clean it thoroughly, and that the relief managers were responsible for the motel's cleanliness during the Fennerns' absence.

Massman fired the Fennerns the night they returned from vacation. Jim was sixty years old and Delores was fifty-eight. Massman never looked at their personnel files before firing

them. He did not know that the Fennerns had successfully cleaned up motels in other cities, and opened new motels.

Mike and Loree Shearouse relatively inexperienced managers, replaced the Fennerns. Michael was thirty-five and Loree was forty-nine. Michael had two months of experience managing motels for Motel 6 and Loree had six months of experience. The Shearouses received cleaning support that the Fennerns did not receive. Delores Fennern had received a biweekly salary of $820; Loree Shearouse received a biweekly salary of $346.40. Jim Fennern received an hourly wage of $4.25, the same as Michael Shearouse.

The Fennerns filed claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the IHRA. The jury returned a verdict in favor of the Fennerns, finding that age was a motivating factor in their termination and that Motel 6 had willfully violated the statute. The jury awarded Jim Fennern $15,583 in back pay, $12,323.70 in front pay, and $15,583 in exemplary damages[3] for a total award of $43,489.70. The jury awarded Delores Fennern $64,471 in back pay, $57,622.30 in front pay, and $64,471 in exemplary damages for a total award of $186,564.30.

The district court denied Motel 6's motion for judgment as a matter of law as to liability, but granted a new trial, finding the evidence insufficient to justify a favorable verdict

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3. *The district court ruled separately that liquidated damages under the ADEA and punitive damages under the Idaho Human Rights Act were duplicative, and awarded only the higher* ADEA damages.

for the Fennerns, and concluding that consolidating the trials had been an error that severely prejudiced Motel 6. The court also granted judgment as a matter of law and a conditional new trial on Motel 6's willful violation of the statutes. The district court certified its order as appealable under 28 U.S.C. § 1292(b) and this court accepted the appeal. The Fennerns timely appealed.

ANALYSIS

1. Age Discrimination Claims

The Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* forbids an employer from discriminating against employees over the age of forty on account of age. *See* 29 U.S.C. §§ 623, 631. The Idaho Human Rights Act, 67-5901 *et seq.*, similarly protects older employees and employs the same legal standards as the ADEA. *See O'Dell v. Basabe*, 119 Idaho 796, 811, 810 P.2d 1082 (1991). The Huttingers and the Fennerns, both over age forty, argue that Motel 6 terminated them because of their age.

Age discrimination claims are subject to the same, familiar burden-shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888-89 (9th Cir. 1994). The plaintiff has the initial burden of establishing a prima facie case of discrimination and must prove that she was (1) a member of a protected class, age 40-70; (2) performing her job in a satisfactory manner; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications. *Id.* at 891. The establishment

of a prima face case "in effect creates a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). The burden then shifts to the employer to show a legitimate, nondiscriminatory reason for its employment decision. *See McDonnell-Douglas*, 411 U.S. at 802. The burden then shifts back to the plaintiff to show that the employer's stated reason was pretextual. *See id.* at 804. The ultimate burden of persuading the trier of fact remains at all times with the plaintiff. *See St. Mary's Honor Center*, 509 U.S. at 507.

Both sets of plaintiffs undisputedly established a prima facie case of discrimination. Motel 6 met its burden by advancing nondiscriminatory reasons for its decisions to terminate the Huttingers and Fennerns. Because the plaintiffs retain the burden of persuasion, we must determine whether the plaintiffs produced evidence that undermined Motel 6's alleged nondiscriminatory reasons for termination and whether that evidence supported the jury's conclusion that age was a motivating factor in each plaintiffs' termination. *See e.g., St. Mary's Honor Center*, 509 U.S. at 511.

1. Judgment as a Matter of Law Against the Huttingers

We review de novo a district court's decision to grant judgment as matter of law. *EEOC v. Pape Lift Inc.*, 115 F.3d 676, 680 (9th Cir. 1997). Judgment as a matter of law is appropriate only where the evidence, construed in the light most favorable to the nonmoving party, "permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997); *accord Omega Envtl., Inc. v. Gilbarco, Inc.*, 127

F.3d 1157, 1161 (9th Cir. 1998). Judgment as a matter of law may not be used simply because of disagreement with a jury's verdict.

The standard for granting judgment as a matter of law is the same as that for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, . . . it is for the trier of fact to decide which story is to be believed." *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). A fact finder's "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," but it does not compel judgment for the plaintiff. *See St. Mary's Honor Center*, 509 U.S. at 511 (emphasis in original).

The sources of the evidence against the Huttingers — a relief manager who took over the Huttingers' managerial role after their termination, and a disgruntled employee — were not "disinterested" witnesses as the district court concluded. The evidence that the area manager who terminated the Huttingers held that position for less than one month before conducting his surreptitious inspections, never reviewed their personnel files, and never inquired about the Huttingers' alleged discriminatory policies before terminating them was before the jury. Although the evidence could have supported a jury verdict in favor of either party, it does not compel a verdict in favor of Motel 6. Judgment as a matter of law, therefore, was inappropriate.

Appendix A

2. New Trial for the Huttingers and the Fennerns

We review for an abuse of discretion a district court's grant of a new trial. *Anheuser Busch v. Natural Beverage Distrib.*, 69 F.3d 337, 346 (9th Cir. 1995); *Roy v. Volkswagen of America, Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990), *amended*, 920 F.2d 618 (1991). We also review for an abuse of discretion a district court's conditional grant of a new trial pursuant to Federal Rule of Civil Procedure 50(c)(1). *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998).

The district court may grant a new trial only if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Roy*, 896 F.2d at 1176; *see also Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1452 (9th Cir. 1988). We must uphold the district court if any of its grounds for granting a new trial are reasonable. *Oltz*, 861 F.2d at 1452. However, a district court may not grant or deny a new trial merely because it would have arrived at a different verdict. *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981).

The jury's verdict in favor of the Huttingers is not against the clear weight of the evidence, the reason advanced by the district court. Although the jury could have believed Motel 6, there was ample evidence supporting the jury's favorable verdict for the Huttingers. A conditional new trial should not have been granted.

Appendix A

We disagree with the district court's conclusion that a new trial was warranted in the Fennern case because the evidence "strongly indicates that a mistake was committed by the jury in rendering its verdict," that the jury incorrectly inferred the ultimate fact of age discrimination, and that Motel 6 was prejudiced by the consolidation of the trials. Although there was evidence to suggest that Motel 6 may have had valid reasons to terminate the Fennerns because they did not keep the motel clean, there was ample evidence showing that Motel 6 had hindered the Fennerns' ability to clean the filthy motel they took over, that relief managers were responsible for cleanliness in the managers' absence, and that the Fennerns were fired because of their age.

We reject the district court's unsupported "alternative and better view" for deciding to grant a new trial. The court also erred in comparing only the relative ages of the Mrs. Fennern and Mrs. Shearouse to find a weak inference of age discrimination. The couples were hired as teams, not individuals. We conclude that the verdict was not contrary to the clear weight of the evidence.

We also reject the district court's decision to grant a new trial because it reconsidered the wisdom of consolidating the cases. A district court has broad discretion to consolidate similar cases. *Investors Research Co. v. United States Dist. Court*, 877 F.2d 777 (9th Cir. 1989). Here, each case involved similar allegations against the same Motel 6 managers, and the same pattern of furtive inspections followed by instant terminations. The parties extensively briefed the issue of consolidation before the district court decided to consolidate the cases. Given the similarities between the cases, Motel 6

was not severely prejudiced by the plaintiffs' decision not to offer statistical evidence of a pattern and practice of age discrimination throughout Motel 6's operations.

3. Willful violation

The jury also determined that Motel 6 had willfully violated both statutes and awarded liquidated damages under the ADEA to the Fennerns pursuant to 29 U.S.C. § 626(b), and punitive damages to the Huttingers pursuant to IHRA, I.C. § 67-5908(3)(e). The district court granted judgment as a matter of law in favor of Motel 6 against both parties, and in the alternative, a new trial pursuant to Rule 50(c)(1).

An ADEA violation is "willful" if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Hazen Paper Co. v. Biggens*, 507 U.S. 604, 614 (1993). It is not "willful" if the employer merely knew that the ADEA was "in the picture." *Id.* "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision." *Id.* at 617.

The district court relied on Seventh Circuit case law to conclude that both parties had failed to prove Motel 6's "intent to recklessly flaunt the ADEA's requirements." *See Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216 (7th Cir. 1991). The Ninth circuit does not use a "recklessly flaunt" standard. To recover punitive damages, a plaintiff must

"make a showing beyond the level of intentional discrimination required for compensatory damages." *See Ngo v. Reno Hilton Resort Corp.*, 156 F.3d 988 (9th Cir. 1998), *amending* 140 F.3d 1299, 1304 (9th Cir. 1998).

Here, the jury was properly instructed that "a defendant's conduct is willful if the defendant knew or showed reckless disregard for whether the discharge of plaintiff because of his/her age was prohibited by the law." A jury could have reasonably concluded that a new area manager who never reviewed the files of ADEA-protected employees, and summarily dismissed them upon their return from vacation after conducting inspections in their absence satisfied the threshold for a willful violation. We conclude that the Huttingers and the Fennerns made the requisite showing that Motel 6 knew or showed reckless disregard for whether its actions violated the ADA. Liquidated damages under the ADEA and punitive damages under the Idaho statute were properly awarded.

CONCLUSION

We conclude that the district court erred in vacating the jury verdicts. The evidence did not compel a finding against the Huttingers, nor was the clear weight of the evidence in favor of Motel 6 in either case. We find no error in the consolidation or the evidence admitted. The jury instructions were proper and no objections were made to them. We reverse the district court's grant of judgment as a matter of law and a conditional new trial in the Huttinger case. We reverse the court's grant of a new trial in the Fennern case. In both cases, we reverse the court's rulings denying punitive

damages under Idaho law and liquidated damages under the ADEA to the parties. We reinstate the jury verdicts in both cases.

REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JUNE 10, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-80387

DC# CV-95-121-BLW
Idaho (Boise)

JAMES FENNERN; et al.,

Plaintiffs-Appellants,

vs.

MOTEL 6 OPERATING LP; et al.,

Defendants-Appellees.

ORDER

Before: REINHARDT and THOMPSON, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX C — ORDER OF CERTIFICATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO DATED AND FILED MAY 13, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 95-0121-E-BLW

JAMES FENNERN AND DELORES FENNERN,
husband and wife,

Plaintiffs,

v.

MOTEL 6 OPERATING L.P., and
MOTEL 6 G.P., INC.,

Defendants.

ART HUTTINGER AND DONNA HUTTINGER,
husband and wife,

Plaintiffs,

v.

MOTEL 6 OPERATING L.P., and
MOTEL 6 G.P., INC.,

Defendants.

Appendix C

ORDER OF CERTIFICATION

The Court has before it the plaintiffs' motion for an order certifying these consolidated cases for appeal to the Ninth Circuit.[1] An abbreviated recitation of the background of this litigation follows:

The Fennern plaintiffs and the Huttinger plaintiffs are former employees of Motel 6. They were discharged by Motel 6 and, as a result, filed separate age-discrimination claims against Motel 6. Over the objection of Motel 6, the Court consolidated the cases for trial, at the conclusion of which the plaintiffs obtained verdicts in their favor. Motel 6 moved alternatively for judgment as a matter of law or for a new trial in both cases. The Court granted judgment as a matter of law in favor of Motel 6 in the Huttinger case in its entirety and on one issue in the Fennern case, and it granted a new trial on the remainder of the Fennern case.

It appears that the plaintiffs presumed that the Court's ruling could be immediately appealed to the Ninth Circuit. However, the new-trial order in the Fennern case is not immediately appealable without an order of certification

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1. The plaintiffs also filed a motion to expedite the decision of their motion for certification. Despite the motion to expedite, the Court allowed Motel 6 to have the ordinary time for response permitted by the Local Rules because of the lack of a demonstrable need for an earlier decision. However, because the Court has decided to grant the motion for certification after reviewing the plaintiffs' and Motel 6's initial briefs, the Court will grant the motion to expedite in the sense that it will not await a reply brief from the plaintiffs prior to rendering decision.

under 28 U.S.C. § 1292(b) and, consequently, the entry of judgment as a matter of law in the Huttinger case is not appealable without the issuance of a Rule 54(b) certificate. The plaintiffs now seek such orders of certification. The Court will grant the motion for certification in both cases, and its reasoning follows.

The Huttinger Case

An appeal from a final order in one of multiple consolidated cases is permitted only upon certification under Rule 54(b) of the Federal Rules of Civil Procedure. *See Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). Thus, since a new trial was ordered in the Fennern case, the Court must issue a Rule 54(b) certificate before the Huttinger case may be appealed. Under Rule 54(b), the Court may enter a final judgment in the Huttinger case under these circumstances "only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." Fed.R.Civ.P. 54(b). As a threshold matter, the Court notes that Motel 6 does not object to the issuance of a Rule 54(b) certificate in the Huttinger case.

The Court agrees with the Huttingers, and with Motel 6, that there is no just reason for delay of the appeal of the Huttinger case. The most significant issue in both of the cases is whether the jury's disbelief of Motel 6's proffered reasons for discharging the plaintiffs was supported by the evidence at trial. The proffered reasons in each case were entirely dissimilar, and there was little, if any, overlap in the evidence presented by the Fennerns and the Huttingers at trial. Therefore, the result on appeal of one case is not in any

necessary sense linked with the result of the other, despite the fact that there is some potential that certain common legal issues could be involved in the appeal of both cases.

Moreover, in granting a new trial in the Fennern case, the Court noted its opinion, aided by the hindsight acquired by having gone through trial, that the cases should not have been tried together in light of the plaintiffs' morning-of-trial abandonment of their attempt to put on pattern-and-practice evidence of age discrimination on the part of Motel 6. Part of the Court's rationale was that the similarities of the cases are largely superficial and not particularly significant. The Court adheres to that opinion at this time.

For these reasons, the Court finds that there is no just reason for delay of the appeal of the Huttinger case.

Upon granting judgment as a matter of law in favor of Motel 6 in that case, the Court entered an Amended Judgment reflecting its ruling. The Court did so because it presumed the Huttinger case to be appealable at that point without a Rule 54(b) certificate, regardless of the pendency of the Fennern case. The Court now directs the parties to consider the Amended Judgment to be a final judgment in satisfaction of Rule 54(b)'s requirement of an "express direction for entry of judgment." The motion for a Rule 54(b) certificate in the Huttinger case is granted.

The Fennern Case

A new-trial order is interlocutory and not immediately appealable. *See Schudel v. General Elec. Co.*, 120 F.3d 991,

994-95 (9th Cir. 1997). The Fennerns seek certification of the new-trial order, as well as the partial grant of judgment as a matter of law against them, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court may only certify a ruling for interlocutory appeal under that statute if it meets the following requirements: (1) it must involve a controlling question of law; (2) there must be substantial grounds for differences of opinion regarding that question; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *See In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982).

A question of law is "controlling" if its "resolution on appeal could materially affect the outcome of litigation in the district court." *Id.* The Fennerns assert the existence of five such controlling questions of law about which there are substantial grounds for differences of opinion: (1) whether the Court applied the correct standard in deciding to grant a new trial; (2) whether the Court properly required the Fennerns to discredit all of Motel 6's proffered reasons for discharge; (3) whether the Court was permitted to determine whether the jury reasonably inferred age discrimination from its disbelief of the proffered reasons and the other evidence at trial; (4) whether the Court was permitted to consider the consolidation of the Fennern and Huttinger cases for trial, which the Court perceives by way of hindsight to have been prejudicial to Motel 6, as a reason for granting a new trial; and (5) whether the Court correctly granted judgment as a matter of law in favor of Motel 6 on the Fennerns' claim for a willful violation of the Age Discrimination in Employment Act.

Appendix C

As to each of the questions of law raised by the Fennerns, the Court concludes that the first and third elements of the *In re Cement Antitrust Litigation* test are largely satisfied because a decision favorable to the Fennerns could materially affect the necessity of a retrial or the law to be applied upon retrial. However, as discussed below, the Court concludes that only the third issue identified by the Fennerns raises a question of law upon which there are substantial grounds for a difference of opinion. However, even though there may be substantial grounds for a difference of opinion as to that issue, the resolution of that question of law was not essential to the Court's decision to grant a new trial. The Court is therefore reluctant certify its ruling on that particular issue for interlocutory appeal.

Regarding the Fennerns' first assignment of error, the new-trial standard the Fennerns assert was applicable is that the Court could only have granted a new trial if the verdict were against the "great weight" of the evidence. The standard the Court applied used the word "clear" in place of "great." The Court is unable to perceive any meaningful difference between the two standards, and the Court can confidently state that it would have reached the same result by applying the "great weight" standard.

As to the second assignment of error, the Fennerns argue that the Court improperly required the Fennerns to discredit each of Motel 6's proffered reasons for discharge because those reasons were shifting and varied over time. Were they not shifting, the Fennerns concede that it would have been appropriate to require the plaintiff to discredit each of the proffered reasons under *Odima v. Westin Tucson Hotel Co.*,

991 F.2d 595, 598 (9th Cir. 1993). The Court required the Fennerns to discredit each proffered reason because the evidence did not support a finding that the proffered reasons were shifting or varied over time in any meaningful way. Accordingly, the Fennerns' argument regarding the law to be applied where the proffered reasons are shifting is inapplicable.

As to the third assignment of error, the Court agrees that whether it was permitted to examine the inference of discrimination drawn by the jury is a legal question about which there is a substantial grounds for a difference of opinion. Here, however, that question need not be answered. The Court stated three independent grounds for granting a new trial in the Fennern case, the overriding one of which was that the evidence did not support the jury's disbelief of the proffered reasons for discharge. In light of that ruling, the jury had no sound evidentiary basis from which to legitimately infer discrimination. Thus, the Court would still have granted a new trial even if it had concluded that it lacked the power to examine the inference of unlawful discrimination drawn by the jury from its disbelief of the proffered reasons. As such, the result appealed by the Fennerns did not turn on this question of law.

The fourth assignment of error also fails to meet the second prong of the *In re Cement Antitrust Litigation* test. As its third independent ground for granting a new trial, the Court posited that Motel 6 was prejudiced by having the Huttinger and Fennern cases tried together, in light of the plaintiffs' morning-of-trial abandonment of their attempt to put on pattern-and-practice evidence of age discrimination

by Motel 6 in its employment decisions. Motel 6 had earlier unsuccessfully fought the consolidation. In addition to the prejudice of consolidation, the Court determined that Motel 6 was prejudiced by the Court's decision not to admit Motel 6's statistical evidence tending to disprove a pattern and practice of such discrimination because the unforeseen result of the consolidation and this evidentiary decision was to allow the plaintiffs to argue a "pattern" of discrimination based upon their two cases, but to disallow Motel 6 from rebutting the existence of such a pattern. The effect was plainly prejudicial. The Court does not see a substantial ground for a difference of opinion on whether it has the discretion to consider the result of pretrial rulings and evidentiary rulings during trial in deciding a motion for a new trial, nor does it see a reasonable basis on which the Fennerns can assert that the Court abused its discretion in doing so.

Finally, the Court also has trouble fitting the Fennerns' fifth assignment of error within the requirements of the *In re Cement Antitrust Litigation* test. While the Court granted a new trial on the issue of whether Motel 6 committed a basic ADEA violation in discharging the Fennerns, the Court instead granted judgment as a matter of law in favor of Motel 6 regarding whether Motel 6 committed a willful violation of the ADEA. Noting that proving a willful violation requires satisfaction of a standard in addition to that which must be satisfied in proving a basic violation, even though the same evidence may be used to meet prove both sorts of violations, the Court concluded that no reasonable jury could have found a willful violation based upon the evidence at trial. Although the Fennerns question whether the Court applied the correct

standard because of its use of the phrase "recklessly flaunt" as a judicial gloss on the applicable "reckless disregard" standard, the Court does not perceive the use of this phrase to have significantly impacted its application of the "reckless disregard" standard, or in any way to have heightened that standard. Rather, the Court perceives the only question about which there could be substantial grounds for a difference of opinion is whether there was evidence from which the jury could have reasonably concluded that the "reckless disregard" standard had been met. This question is not properly certifiable under ordinary circumstances.

However, the partial grant of judgment as a matter of law is significant here in a separate respect. Were the Court to refuse to certify the Fennern case for interlocutory appeal, a new trial could be held in the next few months and would likely consume approximately one week of the Court's calendar. It is most likely that a final judgment would be entered shortly after the new trial that would be immediately ripe for appeal.[2] Had the Court granted a new trial as to all issues, then regardless of whether the new-trial order were affirmed or reversed on appeal, the case would in all likelihood be finally decided by the appeal. However, because the Court granted judgment as a matter of law on the willful-violation issue, that issue will not be submitted to the jury at the second trial. Thus, if the new-trial order is not appealed until after the second trial, a disturbing result could occur: were the Ninth Circuit to affirm the new-trial order, but reverse the entry of judgment as a matter of law

2. Of course, the same result at the second trial as occurred at the first trial — a verdict unsupported by the evidence — is theoretically possible.

and order a new trial as to the willful-violation issue, the parties would then be forced to bear the expense of a *third* trial because the willful-violation issue would not have been presented to the jury at the second trial. Since essentially the same evidence would be used by the Fennerns to prove both a basic and a willful violation, the third trial would be precisely as broad and time-consuming as the second.

This possible result favors allowing an immediate appeal of the Fennern case. *See* 16 Charles Alan Wright et al, *Federal Practice and Procedure* § 3930 n. 23 (1995 supp.) (citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 652 F.2d 917 (9th Cir. 1981), as suggesting that the Ninth Circuit considers allowing an interlocutory appeal to be appropriate in circumstances very similar to those presented here). Although the Court views an interlocutory appeal of any individual question of law to be unwarranted under these circumstances, the Court is of the opinion that, as a matter of judicial economy and fairness to the litigants, an interlocutory appeal of all issues presented by the Fennern case is merited. While the Court has difficulty fitting the Fennern case within the strictures of the *In re Cement Antitrust Litigation* test, the Court concludes that Section 1292(b) allows consideration of the factors of judicial economy and the burden to the litigants that might result from repeated, protracted proceedings. *See* 16 Charles Alan Wright et al, *Federal Practice and Procedure* § 3929 (1977) (citing *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754-56 (3rd Cir. 1974)). Because failure to certify this case for interlocutory appeal may well result in multiple new trials, the Court will certify the Fennern case in its entirety for interlocutory appeal under Section 1292(b).

Finally, the Court will stay the proceedings in the Fennern case until the Ninth Circuit determines whether to accept the interlocutory appeal.

ORDER

Based on the foregoing and the Court being fully advised in the premises,

NOW THEREFORE IT IS HEREBY ORDERED, that Plaintiffs' motion for expedite the hearing of their motion for certification (Docket No. 260) shall be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED, that Plaintiffs' motion for certification (Docket No. 258) shall be, and the same is hereby, GRANTED. The Amended Judgment entered on January 20, 1998, in the Huttinger case is to be considered a final judgment, and the Court finds pursuant to Rule 54(b) there to be no just reason for delay of its appeal. The Fennern case is certified for interlocutory appeal under 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED, that this case shall be, and the same is hereby, STAYED until the Ninth Circuit determines whether to accept the interlocutory appeal.

Dated this 13th day of May, 1998.

s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO DATED AND FILED JANUARY 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 95-0121-E-BLW

JAMES FENNERN AND DELORES FENNERN,
husband and wife,

Plaintiffs,

v.

MOTEL 6 OPERATING L.P., and
MOTEL 6 G.P., INC.,

Defendants.

ART HUTTINGER AND DONNA HUTTINGER,
husband and wife,

Plaintiffs,

v.

MOTEL 6 OPERATING L.P., and
MOTEL 6 G.P., INC.,

Defendants.

Appendix D

MEMORANDUM DECISION AND ORDER

The Court has before it Defendants' motion for judgment as a matter of law or, in the alternative, for a new trial. The Court heard oral argument on the alternative motions on September 15, 1997, and they are now at issue. At the conclusion of oral argument, the Court took the alternative motions under advisement, and now issues the following decision. As to the Huttinger claim, the Court will grant Motel 6's motion for judgment as a matter of law. As provided by Rule 50(c)(1), the Court also determines that the alternative motion for new trial should be granted if the Court's decision entering judgment as a matter of law for Motel 6 on the Huttinger claim is vacated or reversed on appeal. As to the Fennern claims, the Court denies Motel 6's motion for judgment as a matter of law as to the Fennern's basic ADEA and IHRA claim, but grants it as to the jury's finding of willfulness and award of liquidated damages. However, the Court grants Motel 6's motion for a new trial as to the Fennern's basic ADEA and IHRA claim, and determines, as provided by Rule 50(c)(1), that the alternative motion for new trial on the issues of willfulness and liquidated damages should be granted if the Court's decision entering judgment as a matter of law for Motel 6 on those claims is vacated or reversed on appeal. Finally, the Court concludes that the Plaintiffs' motion for attorney fees is rendered moot by the Court's decision vacating the judgments entered in favor of Plaintiffs. This Memorandum Decision will explain the Court's reasoning after reviewing the background of this litigation.

Appendix D

LITIGATION BACKGROUND

Plaintiffs James and Delores Fennern ("the Fennerns") managed the Motel 6 establishment in Idaho Falls, Idaho, as a husband-and-wife team for several months until their discharge on January 18, 1994. They had over 10 years of experience managing other Motel 6 establishments. Similarly, Plaintiffs Art and Donna Huttinger ("the Huttingers") managed Motel 6's Pocatello, Idaho, establishment for several years until their discharge on June 2, 1993. Both the Fennerns and the Huttingers were discharged shortly after their returns from vacation, in part as a result of investigations into their performance and conduct as motel managers performed by Motel 6 officials during those vacations. In both situations, the wives were regarded as the "key" employees and were compensated accordingly, while the husbands were minimum-wage employees. Both the Fennerns and the Huttingers were replaced as managers by somewhat younger and less experienced husband-and-wife teams.

The Fennerns and the Huttingers brought separate actions against Defendants Motel 6 Operating L.P. and Motel 6 G.P., Inc. ("Motel 6"), alleging that their discharges were motivated by age discrimination. The Fennerns' complaint asserted claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*, and the Idaho Human Rights Act ("IHRA"), along with other claims that did not survive summary judgment. The Huttingers brought a claim pursuant to the IHRA, but were apparently foreclosed from pursuing an ADEA claim because they did not timely file their grievance with the Equal Employment Opportunity

Commission. The Huttingers' complaint also included other claims that were dismissed on summary judgment. The Court denied summary judgment on the age discrimination claims, largely because the plaintiffs presented some evidence of a pattern and practice of age discrimination by Motel 6 in its employment decisions, including evidence that Motel 6 wished to project a more youthful image and tailored its employment practices accordingly. Partly in anticipation of this evidence, the Court consolidated the separate actions for trial on February 18, 1997. However, on the morning of trial, the plaintiffs abandoned any attempt to put on such pattern-and-practice evidence.

After a 10-day trial, the jury returned verdicts in favor of both the Fennerns and the Huttingers, finding that age was a motivating factor in Motel 6's decision to discharge each of them. Moreover, the jury found that Motel 6 acted "willfully" in discriminating against both the Fennerns and the Huttingers. The Court entered judgments on the jury verdicts, which awarded the Fennerns front pay and back pay, as well as liquidated damages under the ADEA, and awarded the Huttingers front pay and back pay, as well as punitive damages under the IHRA. The Fennerns and the Huttingers subsequently moved for an award of attorney fees, and Motel 6 moved for judgment as a matter of law or, in the alternative, for a new trial on both actions.

The following table sets forth the ages of the Fennerns and the Huttingers at the time of discharge, the ages of their replacements at that time, and the number of years by which the plaintiffs' ages exceeded the ages of their replacements:

Appendix D

Name	Age (years)	Replacement's Age	Differential
Delores Fennern	58	49	9
Jim Fennern	60	35	25
Donna Huttinger	55	43	12
Art Huttinger	68	45	23

As the table indicates, Delores Fennern and Donna Huttinger were approximately 10 years older than their replacements, but their husbands were more than 20 years older than their replacements.

MOTION FOR JUDGMENT AS A MATTER OF LAW

Standard Applicable to Motions for Judgment as a Matter of Law

By its renewed motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Motel 6 requests the Court to reverse the jury's verdicts in favor of both the Fennerns and the Huttingers. A jury verdict may be reversed if it is not supported by substantial evidence. *See Neibel v. TransWorld Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997). "Substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw multiple, inconsistent conclusions from the evidence. *See id.* Thus, judgment as a matter of law in favor of Motel 6 is proper only if the evidence, construed in

the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the one reached by the jury.[1] *See Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997).

The parties, in their briefing, disagreed as to the extent and nature of the evidence that the Court may consider in ruling on Motel 6's motion for judgment as a matter of law. Without entering that fray, the Court finds it sufficient to state that in deciding whether the evidence presented at trial is sufficient to withstand a Rule 50(b) motion, the Court is not free to weigh the evidence or pass on the credibility of witnesses. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 (2d ed. 1994). Instead, it must view the evidence is a light most favorable to the plaintiffs and give the plaintiffs the benefit of all reasonable inferences that may be drawn from the evidence. *See id.* On the other hand, the jury is not free to disregard uncontradicted and unimpeached evidence from disinterested witnesses, and such evidence will be considered by the Court in ruling on Motel 6's motion for judgment as a matter of law.[2] *See id.* § 2527.

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1. The standard for granting judgment as a matter of law is equivalent to that for granting summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

2. Although the propriety of considering such evidence in this context is not openly sanctioned by Ninth Circuit case law, the Court believes that doing so is not inconsistent with the Ninth Circuit's admonition to trial judges to avoid weighing the evidence and assessing its credibility. Since juries are not endowed with the power to reject such evidence, they must accept it as true. Rendering trial

(Cont'd)

Appendix D

The Burden-Shifting Analysis

Because the Fennerns' and the Huttingers' cases are based upon claims of disparate treatment, they are analyzed under the *McDonnell-Douglas* burden-shifting analysis.[3] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Under this analysis, the Fennerns and the Huttingers bear the burden of making out *prima facie* cases of discrimination, which create a presumption of unlawful discrimination. *See Id.* A *prima facie* case of age discrimination requires the plaintiffs to show that they were (1) members of the protected class (aged 40-70), (2) performing their jobs in a satisfactory manner, (3) discharged, and (4) replaced by substantially younger employees with equal or inferior qualifications. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1997). Here, the Fennerns and the Huttingers unquestionably met the first and third requirements. Motel 6 strenuously contests that the second requirement was met, and the plaintiffs' showing on the fourth requirement was less than overwhelming.[4]

(Cont'd)
courts powerless to consider, in the context of a motion for judgment as a matter of law, evidence that the jury must accept as true would not only be incongruous, but would have the effect of voiding a desirable check on jury discretion.

3. Although St. Mary's involved a Title VII racial discrimination claim, the burden-shifting analysis undertaken in that case applies to both ADEA claims and IHRA claims as well. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994).

4. Delores Fennern and Donna Huttinger were the "key" employees, and their replacements were only about 10 years younger
(Cont'd)

Appendix D

Assuming that the Fennerns and the Huttingers established *prima facie* cases of age discrimination, the burden shifted to Motel 6 to produce evidence that it had legitimate, nondiscriminatory reasons for discharging them. *See Nidds*, 113 F.3d at 916. Motel 6 presented multiple nondiscriminatory reasons for doing so. With respect to the Fennerns, Motel 6 produced evidence that it discharged them for the following reasons, among others: (1) they failed a motel inspection; (2) they improperly checked employment references; and (3) they left for vacation with Room 114 at their motel "down" (*i.e.* unrentable). Motel 6 produced evidence that it terminated the Huttingers for the following reasons: (1) they implemented a desk-clerk policy that discriminated against prospective Native American guests; (2) they violated Motel 6's safety and security policies; and (3) there were numerous employee complaints about the Huttinger's performance as managers, including complaints that the Huttingers had employees work on their private motor home on Motel 6's time.

The burden of production having been met, the presumption of unlawful discrimination vanished, and the plaintiffs bore the ultimate burden of persuading the jury

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(Cont'd)
and were also members of the protected class. On the other hand, their husbands' replacements were more than 20 years younger. In any event, the Court will assume the somewhat slight age difference of the wives to be sufficient to meet the "substantially younger" requirement, but will consider it as bearing on the reasonableness of the inference of intentional discrimination drawn by the jury in considering the alternative motion for a new trial in the Fennern's case.

that they were victims of unlawful discrimination. *See id.* This could have been accomplished by producing sufficient evidence to allow the jury to conclude *either* (1) that the true reason for their discharge was age discrimination or (2) that Motel 6's proffered nondiscriminatory reasons for their discharge were false. *See id.* at 918. The former means of proof involves traditional direct evidence of discriminatory intent. The latter means of proof would satisfy the plaintiffs' burden of persuasion because the jury's disbelief of Motel 6's stated reasons for discharge, coupled with the elements of the *prima facie* case, would permit the jury to infer the ultimate fact of intentional discrimination.[5] *See St. Mary's*, 509 U.S. at 511; *Nidds*, 113 F.3d at 918 n. 2. Thus, in gauging the adequacy of the plaintiffs' evidence, the Court must consider both the direct evidence of discriminatory intent and the evidence supporting a conclusion that Motel 6's stated reasons for discharging the plaintiffs were pretextual.

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5. This is not to say, however, that a jury is required to infer intentional discrimination from its disbelief of an employer's proffered reasons for the employee's discharge. For example, a weak *prima facie* case may lead the jury to conclude that, although the employer's proffered reasons were pretextual, age discrimination was not the real reason for discharge. In the same light, the *prima facie* case may be so weak in a particular case that the court may conclude that it cannot be coupled with evidence of pretext to permit the trier of fact to infer the ultimate fact of intentional discrimination. In such a case, evidence sufficient to support a finding of pretext would not be sufficient to resist an employer's Rule 50(b) motion. However, that case is not presented here.

Appendix D

Plaintiffs' Direct Evidence of Discriminatory Intent

The Fennerns' only "direct" evidence of Motel 6's intent to discriminate based upon age consisted of comments made to them on two occasions by Doug Massman, an Area Manager for Motel 6, to the effect that he could replace them with college students at a lower wage. Jim Fennern admitted that Massman made the statements at least six months before the Fennerns were discharged and prior to their transfer from Motel 6's Jackson, Wyoming, establishment to its Idaho Falls establishment; neither of the Fennerns testified that a Motel 6 official ever commented directly about their ages. These passing remarks are the nearest approximation of direct evidence of age discrimination against the Fennerns by Motel 6. Such passing remarks have routinely been held to be insufficient to establish age discrimination. *See e.g., Nidds*, 113 F.3d at 918-19; *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990). Moreover, Massman's comment has no relevance here, since the Fennerns were not replaced by college students, but by a wife and husband aged 49 and 35, respectively.

The Huttingers failed to introduce even a passing comment like Massman's "college student" remark. Accordingly, the Court holds that, as a matter of law, neither the Fennerns nor the Huttingers introduced sufficient direct evidence that Motel 6's true reason for discharging them was age discrimination to support a finding by the jury to that effect. As such, the Court can allow the verdicts to stand only if the plaintiffs adduced substantial evidence to support a finding by the jury that Motel 6's proffered reasons for

discharge were false, and that such a finding, in combination with the plaintiffs' *prima facie* cases, reasonably gives rise to an inference of unlawful discrimination.

Plaintiffs' Evidence that the Proffered Reasons for Discharge were Pretextual

For the jury to have reasonably disbelieved Motel 6's proffered reasons, the Fennerns and the Huttingers must have introduced evidence sufficient to demonstrate that "(1) the proffered reasons are factually baseless; (2) the proffered reasons were not the actual motivation for the discharge; or (3) the proffered reasons were insufficient to motivate the discharge."[6] *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996). If the Fennerns and the Huttingers made at least one of the three demonstrations required by *Wolf* for any particular reason, the Court would be required, in the context of a motion for judgment as a matter of law, to accept the jury's disbelief of that proffered reason. However, unless the multiple reasons for discharge are " '. . . so intertwined, or the pretextual character of one of them so fishy and suspicious . . .'," the plaintiffs must cast doubt on *each* proffered reason. *Wolf*, 77 F.3d at 920 (holding that, under the circumstances of the case, the plaintiff's success at discrediting four of the six proffered reasons was not enough

6. Although *Wolf* is a Seventh Circuit decision and therefore not binding, the Court adopts the *Wolf* framework for the purposes of analysis of the demonstration necessary to properly discredit Motel 6's proffered reasons. The Court does so because *Wolf* applies the burden-shifting analysis consistent with Ninth Circuit authority, and it provides a comprehensive means by which to analyze the issue of the jury's disbelief of the proffered reasons.

to carry his burden of proof) (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995)).

The only area in which the Fennern and the Huttinger cases significantly differ is in Motel 6's proffered reasons for discharge. The Court will treat each case separately, seeking to determine whether the plaintiffs introduced substantial evidence from which a reasonable jury could have concluded that Motel 6's proffered reasons for discharge were false and pretextual.[7]

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7. As the plaintiffs suggest, in some cases effective cross-examination of defense witnesses by itself may suffice to discredit the proffered reasons. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981). This was not such a case. The numerous "inconsistencies, contradictions and outright falsehoods" in the testimony of Massman and Scott Griffith, Motel 6's Regional Vice President that the plaintiffs claim to have brought out during cross-examination of them (Pls.' Opp'n Br. at 11-20) do not strike at the heart of their testimony. At most, they demonstrate Massman's and Griffith's inability to perfectly recall a sequence of events that occurred over three years prior to trial. For this reason, the Court finds it unnecessary to examine each such inconsistency. Similarly, the plaintiffs argue that the investigation into their managerial conduct performed by Massman and Griffith was cursory, which gives rise to an inference that the proffered reasons were pretextual. Although a cursory investigation in certain cases can support such an inference, *see Rademaker v. Nebraska*, 906 F.2d 1309, 1312 (8th Cir. 1990), the evidence at trial simply does not bear out the plaintiffs' assertion that Massman and Griffith decided to discharge them after only a minimal inquiry. The record is replete with evidence of motel inspections by Massman and Griffith, of communications between Massman and Griffith and the staff at the motels managed by the plaintiffs regarding the plaintiffs' managerial conduct and performance, and of discussion between Massman and Griffith themselves analyzing the findings of their investigation.

Appendix D

The Fennern Case

As earlier stated, Motel 6 offered three principal reasons for its discharge of the Fennerns: (1) they failed a motel inspection; (2) they improperly checked employment references; and (3) they left for vacation with Room 114 at their motel "down" (*i.e.* unrentable).[8] These reasons were set forth in a memorandum authored by Massman, which was presented to the Fennerns upon their discharge. The Court will consider each stated reason in turn.

Failed Motel Inspection

It was undisputed at trial that the Idaho Falls establishment managed by the Fennerns failed an inspection by Massman and Griffith on January 6, 1994, some 12 days before their discharge. As earlier stated, the inspection occurred while the Fennerns were on vacation. Both of the Fennerns admitted that the motel was insufficiently clean to meet Motel 6 standards. As such, this proffered reason for discharge clearly has a basis in fact.

Moreover, there could be no reasonable doubt, based upon the Fennerns' own testimony, that failure to meet Motel

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8. In addition to these reasons, Motel 6 proffered three additional reasons for the discharge, which arose or were discovered by Motel 6 before the Fennerns were discharged but, after the decision to discharge them had been made. Motel 6 considered these additional reasons to be less weighty. Because they arose after Motel 6 made the decision to discharge the Fennerns, the Court will not consider these additional reasons in ruling on Motel 6's Rule 50(b) motion.

6's cleanliness standards amounted to grounds for discharge. Thus, the jury could only have reasonably disbelieved this proffered reason by concluding that it was not one of Motel 6's actual reasons for discharge, but was instead a pretext used by Motel 6 to disguise some other motive.

The Fennerns took over management of the Idaho Falls establishment some six months prior to their discharge. At that time, the motel was, by all accounts, filthy. The Fennerns testified at trial that it was impossible to meet Motel 6's cleanliness standards within six months and that they had made reasonable progress toward doing so. They also testified that Motel 6 had given them inadequate support to complete the task. In support of these assertions, the Fennerns adduced the testimony of Louis Turman and Cheryl Mower, two of their subordinates at the Idaho Falls establishment. Turman testified that the supplies given the Fennerns by Motel 6 were inadequate to complete the task. Mower testified that the motel's rooms could not be deep-cleaned at the beginning of the Fennerns' management tenure because the motel was at full occupancy during that summer.

Thus, the evidence at trial, although disputed, was sufficient to support a finding by the jury that Motel 6 provided the Fennerns with inadequate supplies and insufficient time to bring the Idaho Falls establishment into compliance with its cleanliness standards. From such a finding, a possible inference was that Motel 6 was attempting to manufacture a performance deficiency to justify a decision to discharge the Fennerns and to disguise some other motive for doing so. Viewing the evidence is a light most favorable to the Fennerns and giving them the benefit of all reasonable

inferences that may be drawn from the evidence, the jury could have reasonably concluded that Motel 6 did not discharge the Fennerns for failing a motel inspection, but used that as a pretext to fire them for some other unstated reason.

Improper Checking of References

Motel 6 also claimed that it discharged the Fennerns because Delores Fennern failed to properly check employment references prior to hiring a desk clerk, Beth Sutherlin. Sutherlin was hired by the Fennerns on December 17, 1993, three days before the Fennerns left for the vacation during which Massman and Griffith conducted the motel inspection. Delores Fennern admitted that, according to Motel 6 policy, she was required to verify two positive employment references prior to hiring a new employee.

The Fennerns admitted that Sutherlin had been previously employed by Motel 6's Idaho Falls establishment the year before her hiring by them, and that her personnel file indicated that she had been fired for excessive absenteeism. Delores Fennern testified that such a notation in Sutherlin's file meant little her because absenteeism was a common problem among Motel 6 employees. However true that statement may be, it does not demonstrate compliance with Motel 6's reference-checking policy — Sutherlin was fired by Motel 6 for having a poor performance record. Motel 6, therefore, could not possibly have been a "positive" employment reference. Moreover, Franci McLaws, Sutherlin's former manager at Motel 6, would not have

recommended rehiring Sutherlin had she been contacted by the Fennerns, because she believed Sutherlin to be a thief.[9]

It was also undisputed at trial that Sutherlin's most recent employer, Melaleuca International, an Idaho Falls-based business, had also fired Sutherlin for excessive absenteeism. Delores Fennern testified to having knowledge of the reason Melaleuca fired Sutherlin.

By all accounts, the two references "checked" by the Fennerns were Motel 6 and Melaleuca International. Motel 6's policy undisputedly required verification of two *positive* employment references, not merely that a prospective hire had held two previous jobs at some point in her life. The Fennerns introduced insufficient evidence that they properly checked Sutherlin's references, especially given the undisputed evidence that Sutherlin had been fired by the two references "checked" by Delores Fennern for excessive absenteeism. Thus, the trial record, construed in a light most favorable to the Fennerns, establishes that Motel 6 had an adequate factual basis for concluding that the Fennerns did not properly check Sutherlin's employment references.

The Fennerns' failure to check Sutherlin's references proved damaging to the Idaho Falls establishment. Marge

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9. There was testimony from the Fennerns that they believed Franci McLaws to be mentally ill. However, this opinion about McLaws' mental health would not excuse a decision not to comply with Motel 6's policy that no job applicant be hired without checking references from their prior employers. Moreover, the Fennerns presented no evidence that they attempted to contact Willard McLaws, who co-managed the Idaho Falls establishment with Franci McLaws.

Geiger, the relief manager during the Fennerns' vacation, testified that she caught Sutherlin stealing from Motel 6 on two occasions, both within 10 days after her hiring.[10] This evidence was unrefuted by the Fennerns. On the other hand, the evidence presented by the Fennerns suggested that many Motel 6 employees were hired without adequate references and with marginal backgrounds. Additionally, the negative references that Sutherlin's former employers would have given related to absenteeism rather than dishonesty or theft. Accordingly, if the evidence is viewed in a light most favorable to the Fennerns, and they are given the benefit of all reasonable inferences that may be drawn therefrom, one must conclude that the jury could have reasonably found that Motel 6 did not consider the improper checking of references to be serious enough to justify discharging the Fennerns. For the same reasons, the jury could have reasonably concluded that the failure to check Sutherlin's references was not the actual reason for the Fennerns' termination, but a pretext for some other unstated reason.

Leaving Room 114 "Down"

Motel 6 also indicated that the Fennerns were fired because they left for vacation with Room 114 in unrentable condition. Delores Fennern and Jim Geiger[11] testified that Motel 6's policy against "down" rooms was very strict. Delores Fennern herself testified that Motel 6 would not

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10. Marge Geiger no longer worked for Motel 6 at the time of trial and was therefore a disinterested witness.

11. Jim Geiger had left Motel 6's employ by the time of trial and was therefore a disinterested witness.

tolerate down rooms and that managers were required to return a down room to rentable condition as soon as possible. Given this testimony, the jury could not have concluded that Motel 6 perceived that having "down" rooms in violation of Motel 6 policy was insufficient reason to discharge a manager.[12]

The evidence at trial was undisputed that, when the Fennerns left for vacation, Room 114 was being used to store boxed handicapped toilets and other supplies. It was also undisputed that relief managers Jim and Marge Geiger, upon discovering that Room 114 was being used for storage, informed Massman of that fact, and removed the items being stored on or about January 3, 1994.

However, the Fennerns testified that Room 114 was not truly "down" because the items could be easily removed, the carpet vacuumed, and the room would be ready to return to service. They also testified that both Massman and Bob Patrick, a Motel 6 Regional Maintenance Engineer, were aware that Room 114 was being used for storage and had given them permission to do so. Patrick admitted to having given them permission to use Room 114 for storage, at least for a short period of time. Further, Louis Turman, who did

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12. The undisputed occupancy reports covering the period of the Fennerns' vacation indicate that the Idaho Falls establishment had vacancies every day except January 7, 1994. Since the Geigers had restored Room 114's rentability by that date, it appears that Motel 6 did not lose revenue because the Fennerns left for vacation with Room 114 down. However, the fact that the motel was at its capacity on that date indicates that leaving Room 114 down had potential loss-of-revenue consequences for Motel 6.

most of the maintenance work at the motel, testified that Jim Fennern instructed him to remove the items stored in Room 114 so that it could be rented if that became necessary. As such, the Fennerns adduced substantial evidence that Room 114 was not unrentable and that Motel 6 condoned the Fennerns' use of it to store the handicapped toilets in any event. Again, if the jury viewed the evidence in a light most favorable to the Fennerns and gave them the benefit of all reasonable inferences that could be drawn therefrom, they could have concluded that Motel 6 lacked an adequate factual basis for discharging the Fennerns on account of the condition of Room 114.

The same evidence which provides a basis for the jury to conclude that there was no factual basis for relying upon the condition of Room 114 as justification for the Fennern's discharge would also support a jury's conclusion that this breach of Motel 6's policies was not sufficient to justify termination of a motel manager. The Fennerns' evidence that Massman and Patrick knew and acquiesced in the Fennerns' conduct is certainly sufficient to justify a jury's finding that leaving Room 114 in a "down" condition, was not sufficiently egregious to justify the Fennerns' termination. It necessarily follows that the jury could also have concluded that this stated reason for termination was pretextual.

The Huttinger Case

As earlier stated, Motel 6 proffered three main reasons for its discharge of the Huttingers: (1) they implemented a desk-clerk policy that discriminated against prospective Native American guests; (2) they violated Motel 6's safety

and security policies; and (3) they caused numerous employees to complain about their performance as managers, including by having Motel 6 employees work on their private motor home on Motel 6's time. Motel 6 presented these reasons to the Huttingers at a "termination meeting" held to effect and to explain their discharge. Among them, the first is perhaps the most significant.

Discrimination Against Prospective Native American Guests[13]

Aileen Malone, Donna Huttinger's replacement and part of the relief management team during the Huttingers' vacation, testified at trial that one of the desk clerks on duty during the Huttingers' vacation woke her and her husband at night to obtain their approval of prospective Native American guests, pursuant to a policy initiated by the Huttingers. Another desk clerk, Teresa Jenson, testified that the Huttingers instructed her not to rent rooms to Native Americans without their prior approval and that she was reprimanded for renting rooms to Native Americans without doing so.

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13. The Court notes that Motel 6 also purported to have discharged the Huttingers for discriminating against locally-residing prospective guests on much the same basis as it purports to have discharged them for discriminating against Native Americans. Because the issue of discrimination against "locals" is largely subsumed by the issue of discrimination against Native Americans and was regarded by the parties to some degree as a less serious form of discrimination, the Court will not separately address the "locals" issue.

Appendix D

The Huttingers admitted to authoring desk-clerk memoranda that instructed desk clerks to check the identification of prospective Native American guests more closely than that of other prospective guests.[14] One of those memoranda was in use in the late 1980s and into 1990, and specifically referred to "people who are indians [sic] or look questionable." Donna Huttinger testified that a Motel 6 Area Manager that preceded Massman, Bob Williams, instructed the Huttingers to cease using it in late 1990. She testified that shortly thereafter the Huttingers rewrote the memorandum to be more "politically correct," put the rewritten version in effect, and kept it in effect until their discharge.[15] Donna Huttinger testified, somewhat equivocally, that the memorandum that specifically referred to "indians" ceased to be used at that time and was not in

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14. Neither Malone nor Jenson remained Motel 6 employees at the time of trial and were, therefore, disinterested witnesses. Moreover, the Huttingers did not retake the stand to rebut their testimony. As will be discussed shortly, the Huttingers' testimony on the guest-discrimination issue was at times equivocal and at times inculpatory. Even if they had unequivocally denied both once discriminating against Native Americans and continuing in their discriminatory policies, the Court would conclude that such denials do not constitute a sufficiently head-on contradiction of the testimony of Malone and Jenson to preclude the Court from considering it in deciding Motel 6's motion for judgment as a matter of law. To preclude such consideration, the Huttingers were required to contradict the specific incidents related by Malone and Jenson — it was not enough merely to offer a blanket denial that they had abandoned their discriminatory practices prior to their discharge.

15. Donna Huttinger testified that she never sought Williams's approval of the rewritten version.

use in 1993. This equivocal testimony was flatly contradicted by Jenson, who did not begin working at Motel 6 until one month prior to the Huttingers' discharge. Jenson testified that in that time frame, the Huttingers personally instructed her to comply with the policies stated in both memoranda, that she was reprimanded on two occasions for renting rooms to Native American guests without doing so, and that the Huttingers threatened to fire her if her noncompliance with the memoranda continued. Thus, this proffered reason clearly had a basis in fact.

Donna Huttinger testified that she retained a copy of the memorandum that specifically referred to "indians" in her files, despite the fact that Williams had warned her not to use it. She testified that the copy could only have come into possession of Motel 6 by someone searching her files without her permission, which she contends gives rise to an inference that Motel 6 officials searched her files in an effort to unearth something to support a decision to discharge to her. This inference is unreasonable, and contradicts the sworn and uncontradicted testimony Geiger and Jenson that (1) copies of the policy were kept in file folder marked "training desk clerks," (2) additional copies were located in Jenson's personnel file, and (3) it was Geiger, and not Massman or some other member of Motel 6's management, who discovered the policy in the desk clerk training file and forwarded it on to Massman.

The most compelling evidence that the policy was still in effect at the time Motel 6 decided to discharge the Huttingers is provided by the written document itself. The notation or signature "Teresa Jenson TJ" appears on the

second page of the memorandum. As previously noted, Jenson started working for the Huttingers approximately one month prior to their termination. When confronted with this inconsistency on cross examination, Donna Huttinger indicated that the writing was in her handwriting, and that she had no idea when the notation was written on the policy. On redirect examination, counsel for the plaintiffs opted not to explore the issue, and that was where it was left until Geiger and Jenson took the stand during Motel 6's case. At that time, Aileen Geiger testified as to how she learned of the Huttinger's discriminatory policies, and Jenson testified that she had been repeatedly berated by Donna Huttinger for not following the Huttinger's check-in policies, including the policy which discriminated against Native Americans. Jenson further testified that on one such occasion, Donna Huttinger took the offensive policy out of the file, put a pen in Jenson's hand, grasped that hand and guided Jenson's hand as she wrote her name on the paper. This was apparently done to stress that Jenson was like a child who could not follow simple directions. In any event, Jenson testified that the copy of the policy with her name on it was then put in Jenson's personnel file, where it was later discovered by Geiger. Although they had the opportunity to retake the witness stand and contradict this testimony, neither of the Huttingers took the stand on rebuttal. Thus, Geiger's and Jenson's testimony was left unrebutted and uncontradicted.

No reasonable jury could have found that the Huttinger's discrimination policy had been abandoned in 1990, in the face of the disinterested and uncontradicted testimony of Aileen Malone and Teresa Jenson, the presence of the written policy in the Huttingers' files in 1993, and the signature or

notation indicating that it was shown to an employee less than one month prior to the Huttingers' termination.

The Huttingers introduced no evidence suggesting that Motel 6 condoned racially discriminatory guest approval policies. Quite to the contrary, Donna Huttinger testified that a Motel 6 official ordered them to cease applying such policies three years prior to their discharge. Thus, the jury could not have reasonably concluded that Motel 6 would not consider such discrimination serious enough to warrant discharge.

Moreover, the jury could not have reasonably concluded that Motel 6 did not in fact discharge the Huttingers in part for this reason. The Huttingers' policies with regard to prospective Native American guests were flagrant violations of the law and of Motel 6 policy. There is simply no evidence in the trial record that Motel 6 used those violations as a convenient facade to mask a discriminatory motive, nor is there any apparent reason for it to have done so.

Safety and Security Policy Violations

At the termination meeting, Massman and Griffith also explained to the Huttingers that their violations of Motel 6's safety and security policies in part accounted for their discharge. Among these were violations of the "key control" policy and of the policy regarding overgrown shrubs and trees. At trial, Donna Huttinger admitted the existence of some of the violations and testified that she was unsure of the existence of others. Art Huttinger testified that Griffith, after conducting an inspection of the premises, told him four

months prior to their discharge that their failure to utilize "blue tags" was a violation of the "key control" policy. Art Huttinger further testified that he was in possession of the blue tags, but failed to utilize them. Jim and Aileen Malone, the Huttingers' replacements, corroborated several of the violations.[16]

The Huttingers' evidence on the issue of the proffered safety and security violations consisted largely of their own testimony denying the importance of some of the violations, attesting to the ease of remedying others, and denying the existence of still others. In combination with their admissions and the disinterested, unrefuted testimony of the Malones, the jury could not have reasonably concluded that there was no basis in fact for at least some of the violations.

Further, there was ample testimony from several sources — including the Huttingers themselves — that Motel 6 took its safety and security policies very seriously and that violations of them constituted grounds for immediate discharge. Jim Malone testified, and the Huttingers did not contradict this testimony, that Massman told him to immediately cure these violations upon replacing the Huttingers. As such, the jury could not have reasonably concluded that the safety and security violations were not serious enough to Motel 6 to warrant the Huttingers' discharge.

From these facts, it follows that the jury could not reasonably have concluded that Motel 6 did not discharge

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16. Jim Malone also had ceased working for Motel 6 at the time of trial.

the Huttingers in part for these violations. Motel 6 need not create a pretext to disguise another motive in a situation in which it had, beyond any reasonable dispute, ample cause for dissatisfaction with the Huttingers' job performance.

Widespread Employee Complaints

Finally, Motel 6 officials informed the Huttingers at the termination meeting that one of the reasons for their discharge was that there were widespread employee complaints about the Huttingers. Aileen Malone testified that, shortly after the Malones began working as relief managers while the Huttingers were on vacation, several Motel 6 employees submitted oral and written complaints about the Huttingers to the Malones. She further testified that they passed on the complaints to Massman on or before May 28, 1993, which was the date on which Massman met with Griffith to recommend the Huttingers' discharge. As such, the proffered reason had a basis in fact.

The Huttingers did not dispute the accuracy of the complaints at trial. Art Huttinger admitted that he ordered employees of the Pocatello establishment to work on the Huttingers' personal motor home. Donna Huttinger admitted that doing so violated Motel 6 policy. Further, Joe Demarest, one of the Huttingers' witnesses, testified that this violation constituted grounds for discharge.

The Huttingers' only real response was that the complaints were not sufficiently serious to jeopardize their jobs. In support of this assertion, they cite Massman's testimony that he did not need evidence of employee

complaints to justify discharging the Huttingers in light of the seriousness of the other reasons for discharge. However, the fact that other deficiencies in the Huttingers' performance were more serious does not support an inference that employee complaints was not a sufficient justification for the Huttingers' discharge.

Given the undisputed fact that the complaints were spontaneously generated by the Motel 6 employees in the Huttingers' absence, the jury could not have reasonably concluded that Motel 6 concocted this problem as a facade to hide some other motive for discharging the Huttingers. This is particularly true when these complaints are considered in conjunction with the Huttingers' problems with Motel 6's discrimination and security policies.

In summary, the jury could not have reasonably concluded in the face of evidence from disinterested witnesses which supported Motel 6's proffered reasons for termination and the Huttingers' inability to contradict or rebut those stated reasons, that any of Motel 6's reasons for discharge were pretextual.[17] As earlier stated, unless the

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17. The Court notes that the jury could not have reasonably disbelieved the proffered reasons in the Huttinger case based upon similarities between the manner in which Massman and Griffith went about discharging the Huttingers and the Fennerns. Although there were certain similarities (*e.g.*, the temporal proximity of the discharges to the plaintiffs' vacations), those similarities do not rebut the existence of the serious conduct violations committed by the Huttingers. Moreover, at approximately the time Massman and Griffith discharged the Huttingers, Massman and Griffith granted

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multiple proffered reasons for discharge are intertwined, or one of them is "fishy," the plaintiffs must cast doubt on *each* proffered reason. *See Wolf*, 77 F.3d at 920. The Court concludes that the multiple proffered reasons are not so intertwined, nor is any one of them so suspicious, that the Huttingers should be absolved from their obligation to cast doubt on each reason. Each proffered reason has an independent basis in fact, and none is so farfetched as to give the impression that it must have been manufactured for the purpose of hiding an unspoken motive. Even if a reasonable jury could have concluded that the Huttingers were able to cast doubt on *one* of the proffered reasons, no reasonable jury could have concluded that they discredited all of them. For this reason, Motel 6 is entitled to judgment as a matter of law on the Huttinger case.

The Plaintiffs are Not Entitled to Liquidated Damages[18]

A willful violation of the ADEA gives rise to liquidated damages, *see* 29 U.S.C. § 626(b), much as a willful violation

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the Fennerns a transfer from a larger motel to the smaller (and therefore more manageable) Idaho Falls establishment. If Massman and Griffith held the same motivation in each case, they would have discharged the Fennerns at that time instead of granting them a transfer.

18. The Court declines to foreclose Motel 6 from pursuing judgment as a matter of law on the "willfulness" issue for the technical reason suggested by the plaintiffs — that Motel 6 did not move for judgment as a matter of law on that particular issue at trial
(Cont'd)

of the IHRA gives rise to punitive damages.[19] *See* I.C. § 67-5908(3)(e). The jury found that Motel 6 willfully discriminated against both the Fennerns and the Huttingers, which resulted in awards of liquidated damages to the Fennerns and of punitive damages to the Huttingers. An ADEA violation is "willful" "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Hazen Paper*, 507 U.S. at 614. This standard applies whether the plaintiffs prove their case by direct or by circumstantial evidence. *See id.* Of course, some, but not all, ADEA violations give rise to liquidated damages. *See id.*

Although the plaintiffs need not prove the employer's conduct to have been outrageous, or even need provide direct evidence of the employer's motivation, a violation is not willful merely because the employer knew that the ADEA was "in the picture." *Id.* at 614-15. Otherwise, the distinction between willful and non-willful violations would be

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as required by Rule 50(a)(2). Before submission of the case to the jury, Motel 6 moved for judgment as a matter of law as to whether it committed a "basic" (*i.e.* non-willful) violation of the ADEA, but did not specifically move for judgment as a matter of law as to the "willfulness" issue. Clearly, if Motel 6 did not commit a basic ADEA violation, it could not have committed a willful one. For that reason, the Court will not interpret Rule 50(a)(2) so literally as the plaintiffs suggest.

19. As in all other parts of this Memorandum Decision, the Court considers the ADEA and the IHRA to apply coextensively in this regard. Accordingly, any reference to the ADEA applies to the IHRA with equal force.

obliterated. *See id.* In attempting to ensure that the distinction between the two is meaningful, the Ninth Circuit recently held that "[f]or the employer to be in willful violation of the ADEA it must do more than act unreasonably; it must act with knowing or reckless disregard of the ADEA's requirements. *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 644 (9th Cir. 1993). As stated by the Seventh Circuit, to show willfulness, the plaintiffs must show the employer's "intent to recklessly flaunt the ADEA's requirements." *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216 (7th Cir. 1991).

If there is to be any meaningful distinction between willful and non-willful violations, this is clearly a case in which the plaintiffs have not proved willfulness. The Fennerns and the Huttingers adduced no evidence that could reasonably give rise to an inference that Massman and Griffith discharged them while "recklessly flaunting the ADEA's requirements." Certainly Massman and Griffith were aware of the existence of the ADEA, but it is a quantum leap from mere awareness of the ADEA to an intent to flaunt it — especially where Motel 6 demonstrated that it had legitimate concerns about the plaintiffs' job performance and where it replaced them with employees relatively near to their ages and within the protected class.[20] The fact that Massman and Griffith did not contact Motel 6's human

20. Again, the Court notes that this goes only for the Fennern and Huttinger wives, who were the high-salaried employees. The husbands and their replacements were significantly more separated in years. However, the husbands were minimum-wage employees and, as such, were not nearly so responsible as were their wives for the job-performance problems of concern to Motel 6.

resources personnel prior to discharging the plaintiffs is insignificant evidence of reckless disregard under the circumstances. The Court is not persuaded that there was any evidence to support the jury's finding of willfulness.

MOTION FOR A NEW TRIAL

Remaining is Motel 6's alternative motion for a new trial pursuant to Rule 59. The Court has the discretion to grant a new trial if "the verdict is contrary to the clear weight of the evidence . . . or to prevent . . . a miscarriage of justice." *Rattray v. City of National City*, 51 F.3d 793, 800 (9th Cir. 1994). Unlike in the context of a motion for judgment as a matter of law, the "existence of substantial evidence does not . . . prevent the court from granting a motion for a new trial . . ." *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). The Court can "weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Id.* "If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial." *Id.*

Because of the Court's extensive discussion of the reasons for its decision to grant Motel 6's Rule 50(b) motion, it is not necessary to discuss in any detail Motel 6's alternative motion for a new trial in the Huttinger case. Although Motel 6 did offer evidence in support of its proffered reasons for discharge that the Court found to be credible, but could not consider in the context of a motion

for judgment as a matter of law, the Court need not discuss any such evidence because the evidence previously considered is sufficient to leave the Court with the definite and firm conviction that the jury mistakenly inferred age discrimination against the Huttingers on the part of Motel 6. Accordingly, pursuant to Rule 50(c)(1), the Court conditionally grants a new trial in the Huttinger case to the extent that the Court's entry of judgment as a matter of law in favor of Motel 6 does not survive appeal.

With regard to the Fennern case, the Court will grant Motel 6's motion for a new trial for a variety of reasons. First, the Court has reviewed the evidence offered by Motel 6 in support of its stated reasons for discharge, but which the Court was precluded from considering in deciding Motel 6's Rule 50(b) motion, and concludes that the evidence was credible and strongly indicates that a mistake was committed by the jury in rendering its verdict. Second, the Court finds that the jury incorrectly inferred the ultimate fact of age discrimination. Finally, the Court concludes that Motel 6 was prejudiced in the Fennern case by the consolidation of that case for trial with the Huttinger case.

As earlier established, there could be no reasonable doubt based upon the evidence at trial that the Fennerns failed to meet Motel 6's cleanliness standards[21] and that Motel 6 took its cleanliness standards seriously enough to discharge its motel managers for failing to comply with them. However,

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21. The Court notes that this evidence of poor performance by the Fennerns as managers goes not only toward the reasonableness of the jury's disbelief of Motel 6's proffered reasons for discharge, but also toward the strength of the Fennerns' *prima facie* case.

the jury could have concluded that Motel 6 provided the Fennerns with inadequate support and time to comply with its cleanliness standards, and could have inferred from this conclusion that Motel 6 used this as a pretext to hide some other motive for discharging them.

Motel 6 brought forth convincing testimony to rebut the Fennerns' claim of inadequate support for their clean-up effort and in support of its business decision to discharge them for failing to meet the cleanliness standards. With regard to the adequacy of support, Motel 6 introduced purchase requisitions demonstrating that the Fennerns received more supplies than they admitted to receiving. Further, Delores Fennern admitted to having access to a carpet shampooer, which she used for a time to clean four rooms per day — had she done so long enough, the carpets of the 80-room motel would have been cleaned within a month. Finally, Loree Shearouse, Delores Fennern's replacement, testified that she was able to clean the motel using the same supplies provided to the Fennerns.

More importantly, the testimony of Massman and Griffith amply demonstrated that Motel 6 reasonably believed that six months was an adequate period of time for the Fennerns to meet Motel 6's cleanliness standards, especially since the Fennerns had more than 10 years of experience managing other Motel 6 establishments and since the Idaho Falls establishment had only 80 rooms, far fewer than the Jackson Hole establishment from which the Fennerns had transferred. At issue is not whether Motel 6 was correct in believing that the Fennerns could have properly cleaned the Idaho Falls establishment within six months. Instead,

the issue is whether Motel 6 had a reasonable basis for that belief. As a matter of logic, six months appears to be sufficient time in which to clean an 80-room establishment; at the leisurely rate of one room per day, the Fennerns could have completed the task within three months. Further, Loree Shearouse testified that she was able to thoroughly clean the motel in less than six months, despite her lack of managerial experience. "Granny" Seelke, a subordinate of both the Fennerns and the Shearouses, testified that the Shearouses kept the motel much cleaner than did the Fennerns, in part because of Loree Shearouse's active style of management.

The Court concludes, on the strength of that evidence, that the jury was mistaken in disbelieving that Motel 6 discharged the Fennerns in part for failing the motel inspection. The Fennerns' failure to comply with Motel 6's cleanliness standards was clearly Motel 6's primary concern and was unquestionably sufficient in itself to justify their discharge. Massman and Griffith discovered the improper checking of references and the condition of Room 114 in the days surrounding the motel inspection that revealed the serious violations of Motel 6's cleanliness standards. The reasonable inference to be drawn was that Motel 6 considered these other reasons for discharge to be serious enough to bolster its main reason — the Fennerns' failure to comply with the cleanliness standards. There is nothing suspicious in Motel 6's decision to state all of its reasons for discharge, even if one of them was the overriding concern and was sufficient in itself.

Moreover, even if the Fennerns successfully discredited all of Motel 6's proffered reasons except for their failure to comply with Motel 6's cleanliness standards, their failure to discredit that principle reason is enough to foreclose the reasonableness of any belief that they were not among Motel 6's actual reasons for discharge. As earlier stated, unless the multiple proffered reasons for discharge are intertwined, or one of them is inherently suspicious, the plaintiffs must cast doubt on *each* proffered reason. *See Wolf*, 77 F.3d at 920. As in the Huttinger case, the Court concludes that the multiple proffered reasons are not so intertwined, nor is any one of them so suspicious, that the Fennerns should be excused from their obligation to cast doubt on each reason. Each proffered reason has a completely independent basis in fact, and none is so farfetched as to give the impression that it was manufactured in an effort to disguise an unspoken motive.

It is important to remember that this is an ADEA case and not a wrongful discharge case. Motel 6's proffered reasons for discharge need not be so unassailable as to amount to "cause" for discharge. An employer is free to replace employees with those it subjectively believes will do a better job. *See Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 60 (5th Cir. 1992). Otherwise, employers ". . . 'could do nothing to correct unsatisfactory performance in *senior management*, most of whom will always be within the ADEA's protection.' " *Id.* (emphasis in original) (quoting *Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983)). Motel 6's evidence strongly demonstrates its unhappiness with the Fennerns' clean-up efforts and its subjective belief that the Shearouses would do a better job.

Massman and Griffith simply took action to remove managers that they perceived to be under-performing.

Even if the Fennerns' evidence of pretext were more compelling, the Court concludes that the jury made a mistake in inferring the ultimate fact of age discrimination from that evidence. As previously indicated, Motel 6 replaced Delores Fennern with a woman who was only nine years younger and who was also in the protected class. Delores Fennern bore the primary responsibility for the perceived performance deficiencies as the highly-compensated half of the management team. The inference of age discrimination is quite weak where a 58-year old, with perhaps satisfactory performance, has been replaced by a 49-year old. While such a personnel change can constitute age discrimination, the evidence that the proffered reasons for discharge constitute a pretext for unlawful discrimination must be stronger than in a case in which a 58-year old, with outstanding performance, has been replaced by a 29-year old. The Fennerns simply did not prove that age discrimination was the "real reason" for their discharge, as they were required to do by the Supreme Court in *St. Mary's* and by the Ninth Circuit's implementation of the *St. Mary's* decision.[22]

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22. The Court recognizes that the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and the Ninth Circuit's decision in *Nidds v. Schindler Elevator Corporation*, 113 F.3d 912 (9th Cir. 1997), suggest that the *prima facie* case, coupled with evidence from which the jury could conclude that the reasons for discharge were pretextual, may be sufficient to defeat summary judgment or a Rule 50(b) motion. However, an alternative, and better view, of those decisions is that the trial court can still

(Cont'd)

Appendix D

Moreover, the Court firmly believes that Motel 6 was severely prejudiced by the consolidation of the Fennern and Huttinger cases for trial, in light of the plaintiffs' failure to put on pattern-and-practice evidence of age discrimination. The Court would never have allowed the consolidation in the absence of the plaintiffs' representation that they would base their case on such evidence. The Court assumed that such pattern-and-practice evidence would necessarily lead to evidence relating to the Fennerns' termination being presented during the Huttinger case, and vice-versa. For reasons of judicial economy and the lack of prejudice to Motel 6 in that setting, the Court permitted the joinder of the two cases for trial.

However, without this evidence, the cases were insufficiently similar to justify joinder. The similarities regarding the age differentials of the plaintiffs and their replacements, the temporal proximity of the firings, and the fact that the firings occurred subsequent to the plaintiffs' vacations pale by comparison to the substantial differences in the reasons for discharge proffered by Motel 6. Without pattern-and-practice evidence, the Court would not have permitted the Huttingers to testify in the Fennern case, and vice-versa. It appears, however, that the jury may well have found a "pattern" in the two cases because of the relatively

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(Cont'd)
assess whether that combination gives rise to a reasonable inference of discrimination which would justify a jury in returning a verdict for the party claiming discrimination. On the other hand, it seems clear that the reasonableness of the jury's inference of discrimination may be properly assessed in the context of a Rule 59 motion for new trial.

inconsequential similarities and rendered its verdict on that basis.

Additionally, the Court precluded Motel 6 from offering statistical evidence on its hiring and discharge patterns to demonstrate a lack of statistical support for any practice of age discrimination upon learning that the plaintiffs' had abandoned their pattern-and-practice argument. The Court reasoned that the plaintiffs would be unfairly prejudiced by such broad evidence of lack of discriminatory practices where the plaintiffs would no longer attempt to demonstrate age discrimination outside the context of their two particular cases. The unforeseen effect of this ruling was to permit the plaintiffs to argue a pattern and practice of age discrimination based upon their two cases, but to disallow Motel 6 to rebut that argument. Motel 6 was clearly prejudiced by this unintended result.

In summary, the Court has the definite and firm conviction that the jury mistakenly disregarded Motel 6's proffered reasons for discharging the Fennerns, that the jury mistakenly inferred unlawful age discrimination on the part of Motel 6, and that joinder of the two cases for trial prejudiced Motel 6. Accordingly, the Court will grant a new trial in the Fennern case as to whether Motel 6 committed a basic violation of the ADEA. Pursuant to Rule 50(c)(1), the Court will conditionally grant a new trial in the Fennern case on the issue of whether Motel 6 willfully violated the ADEA in the event that its entry of judgment as a matter of law in favor of Motel 6 on that issue does not survive appeal.

Finally, because the Court has decided either to grant judgment as a matter of law in favor of Motel 6 or a new trial with regard to all claims of both the Fennerns and the Huttingers, the Court need not reach the issue of whether the measure of damages awarded by the jury was justifiable. Also, because the Court must vacate the jury's verdicts in favor of the plaintiffs, the plaintiffs' motion for attorney fees must be denied.

ORDER

In accordance with the views expressed in the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that Defendants' motion for judgment as a matter of law (Docket No. 227, part 1) shall be, and the same is hereby, GRANTED IN PART and DENIED IN PART. Defendants are granted judgment as a matter of law in the Huttinger case in its entirety and in the Fennern case on the issue of whether Defendants committed a willful violation of the ADEA.

IT IS FURTHER ORDERED, that Defendants' alternative motion for a new trial (Docket No. 227, part 2) shall be, and the same is hereby, GRANTED IN PART and CONDITIONALLY GRANTED IN PART. Defendants are granted a new trial in the Fennern case on the issue of whether Defendants committed a basic violation of the ADEA. Pursuant to Rule 50(c)(1), Defendants' alternative motion for a new trial in both the Fennern and Huttinger cases is conditionally granted to the extent that its entry of judgment as a matter of law does not survive appeal.

IT IS FURTHER ORDERED, that the judgments entered in favor of Plaintiffs (Docket Nos. 217 and 218) are hereby VACATED. Pursuant to Rule 58, the Court will enter an amended judgment in favor of Defendants in the Huttinger case by means of a separate document in accordance with this Memorandum Decision and Order.

IT IS FURTHER ORDERED, that Plaintiffs' motion for attorney fees (Docket No. 219) shall be, and the same is hereby, rendered MOOT.

Dated this 20th day of January, 1998.

s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 2, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35533
D.C. No. 95-CV-262

Art Huttinger, husband; and Donna Huttinger, wife

Plaintiffs – Appellants

v.

Motel 6 Operating LP; Motel 6 GP, INC.,

Defendants – Appellees.

No. 98-35608
D.C. No. 95-CV-121

James Fennern, husband, and Delores Fennern, wife

Plaintiffs – Appellants

v.

Motel 6 Operating LP; Motel 6 GP INC.;
JOHN DOES, 1-4,

Defendants – Appellees.

Appendix E

Before: B. FLETCHER, REINHARDT and THOMAS, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Reinhardt and Thomas voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommended.

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
DEC 2 0 1999

No. 99-937

In The

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in two fact-intensive age discrimination cases, the Ninth Circuit Court of Appeals correctly reinstated jury verdicts in favor of plaintiffs, where there was substantial competent evidence in each case to support the jury's verdict that the proffered reasons for discharge were pretextual and where, in *Fennern*, there was direct evidence of Motel 6's discriminatory intent.

2. Whether the Court of Appeals properly accepted an interlocutory appeal under 28 U.S.C. § 1292(b) where the district court certified the appeal, where the Court of Appeals has discretion to accept or reject the appeal, and where Motel 6 failed to raise the jurisdictional issue before the Ninth Circuit panel.

3. Whether the Ninth Circuit acted correctly in reversing the district court's grant of a new trial based on improper consolidation, where the Court of Appeals correctly applied an abuse of discretion standard, and where Motel 6 failed to preserve the issue for appeal by timely moving for separation of the trials.

STATEMENT AS TO PARTIES

Pursuant to Supreme Court Rule 29.6, all parties are set forth in the caption.

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

These are disparate treatment age discrimination cases. The Fennerns sued Motel 6 under the Age Discrimination in Employment Act, 28 U.S.C. § 621, *et seq.* and the Idaho Human Rights Act, Idaho Code § 67-5901, *et seq.* The Huttingers sued Motel 6 under the Idaho Human Rights Act. Plaintiffs sought back pay, front pay and exemplary damages.

B. COURSE OF PROCEEDINGS IN THE DISTRICT COURT.

1. ***Fennern v. Motel 6.*** On January 18, 1994 Motel 6 fired the Fennerns as the management team of the Idaho Falls motel and replaced them with a substantially younger and less experienced team. The Fennerns complained to the E.E.O.C. on March 8, 1994 and obtained a Notice of Right to Sue on December 12, 1994. They sued Motel 6 on February 1, 1995 in the Seventh Judicial District Court, Bonneville County, Idaho. The Fennerns alleged age discrimination under the ADEA and the Idaho Human Rights Act. Record 14. Motel 6 removed the case to the United States District Court for the District of Idaho on federal question and diversity jurisdiction grounds. Record 1.

2. ***Huttinger v. Motel 6.*** On June 2, 1993 Motel 6 fired the Huttingers as the management team of the Pocatello motel and replaced them with a substantially younger and less experienced team. On May 22, 1995 the Huttingers sued Motel 6 for age discrimination under the

Idaho Human Rights Act, Idaho Code § 67-5901 *et seq.*, in the Sixth Judicial District Court, Bannock County, Idaho. On June 20, 1995 Motel 6 removed the case to the United States District Court for the District of Idaho on the grounds of diversity of citizenship. Record 1.

3. The Consolidated Cases. Motel 6 moved for summary judgment on all issues. The district court denied summary judgment and ordered the cases consolidated for trial. Record 135, 147. Trial began on March 31, 1997. On April 11, 1997 the jury returned a verdict in favor of all plaintiffs, awarding each plaintiff back pay, front pay and exemplary damages. Record 218.

Motel 6 moved for judgment as a matter of law and new trial in both cases. On January 20, 1998 the district court granted Motel 6's motion for judgment as a matter of law in *Huttinger* and in the alternative granted a new trial. The court denied defendant's motion for judgment as a matter of law in *Fennern* but granted a new trial. In both cases the court granted judgment as a matter of law on the issue of willful violation of the ADEA and the Idaho Human Rights Act. Record 250.

On May 13, 1998 the district court granted the Huttingers' motion for Rule 54(b) certification for appeal and the Fennerns' application for certification for appeal, 28 U.S.C. § 1292(b). Record 263. On June 10, 1998 the Ninth Circuit Court of Appeals granted the Fennerns' petition for permission to appeal, 28 U.S.C. § 1292(b). Pet. App. B, p. 15a. The Fennerns and Huttingers timely filed notices of appeal. On July 16, 1998 the Ninth Circuit Court of Appeals consolidated the cases for appeal.

C. COURSE OF PROCEEDINGS BEFORE THE NINTH CIRCUIT COURT OF APPEALS.

On July 6, 1999 the Ninth Circuit Court of Appeals issued its unpublished decision. Pet. App. A, p. 1a. The Ninth Circuit reversed the decision of the district court in both cases and reinstated the jury's verdicts in their entirety. On September 2, 1999 the Ninth Circuit Court of Appeals denied Motel 6's petition for rehearing and rejected the petition for rehearing en banc. Pet. App. E, p. 67a.

II. STATEMENT OF FACTS.

A. *FENNERN V. MOTEL 6*

Motel 6 hired Jim and Delores Fennern as a motel management team in 1980. They managed motels in Cheyenne, Rock Springs, and Jackson, Wyoming, Midvale, Utah, and Boise and Idaho Falls, Idaho. Their performance was always exemplary. They trained other managers, received annual merit pay increases and numerous occupancy awards. Their annual team appraisals always rated them satisfactory or better. They were experienced not only in cleaning up older dirty motels but in opening new motels.

On July 2, 1993 Area Manager Doug Massman transferred the Fennerns from Jackson, Wyoming to Idaho Falls. The Idaho Falls motel was filthy. The Fennerns worked 10 to 14 hours a day, seven days a week to clean the motel up to Motel 6 standards. Although Doug Massman stymied their efforts by refusing to provide adequate

supplies, equipment and staff, the Fennerns made progress.

The Fennerns went on vacation from December 20, 1993 until January 13, 1994. In their absence the motel was run by relief managers. On January 6, 1994 Doug Massman and Regional Vice President Scott Griffith inspected the motel. This inspection was not part of a regular or routine inspection procedure but was entirely unprecedented. The Fennerns' motels had never before been inspected in their absence. Tr. 188-89. Immediately following the inspection Massman and Griffith made their decision to fire the Fennerns. Tr. 1153. They agreed on three reasons for termination: (1) Failure to check references on a new desk clerk; (2) failing the inspection; and (3) using a motel room to store two boxed toilets (a "down room"). Tr. 1153-54. Neither Massman nor Griffith looked at the Fennerns' personnel file (although it was available), nor consulted with the Fennerns' former area manager (although he was still employed at Motel 6 in the same region) before making their termination decision.

On January 18, 1994, shortly after the Fennerns returned from vacation, Massman fired the Fennerns. The Fennerns had no warning that they were about to be fired. Massman did not give the Fennerns an opportunity to counter the charges against them. Delores Fennern asked Doug Massman to specify the reasons for termination. Although Massman and Griffith had, on January 6, 1994, decided on three reasons for termination, Massman now wrote out five reasons. Pl. Exh. 24. The two additional reasons did not arise until January 17, 1994. Tr. 206,

215. Notwithstanding Doug Massman's deposition testimony that at least one of the latter two reasons – Jim Fennern's failure to promptly restore the motel's phone service following an earthquake – was a definite and serious reason for discharge, Tr. 1471-75, he later recanted this testimony at trial and sheepishly admitted that the latter two reasons were not true reasons for discharge. Tr. 1159-64, 1471-78.

The Fennerns offered evidence to prove each of the three proffered reasons was pretextual:

1. Delores Fennern in fact obtained two satisfactory references on the new desk clerk in accordance with Motel 6 policy, one of which was Motel 6 itself. Tr. 182-86.

2. With respect to the "down room," Doug Massman and Regional Maintenance Engineer Robert Patrick had permitted the Fennerns to use the room for storage. Tr. 203, 422, 1932-35. The room was not "down" in any event, as it could be rented by removing the stored items and vacuuming. Tr. 422-23.

3. The failed inspection was due to a number of factors: Lack of time and support to clean up the motel, Tr. 136-59; the relief managers' failure to make sure the rooms were clean, Tr. 189-93, 559; the head housekeeper's failure to inspect Massman's and Griffith's rooms before check in because they arrived early and demanded rooms immediately, Tr. 561-62; and failure of the housekeeper to properly clean the rooms because Massman and Griffith checked in early. This housekeeper admitted that this was not the Fennern's fault. Tr. 1990-92. While the Fennerns were on vacation it was the relief managers' responsibility to see that the rooms were cleaned. Tr. 188-95,

974-76. The rooms were clean when the Fennerns left on vacation. Tr. 191-92. Moreover, Massman stymied the Fennerns' efforts to clean up the motel by failing to provide them with adequate support and equipment. For example, Massman ordered the Fennerns to re-key the motel and move the key room. They requested assistance from a locksmith, but Massman refused. Tr. 137-39. Massman directed the Fennerns to trim the trees and shrubs surrounding the motel. They requested the assistance of a tree service but Massman refused. Tr. 140-41. The motel badly needed repainting, but Massman would not provide paint. Tr. 141-42. The carpets badly needed shampooing but the carpet shampooer was broken. Massman refused to provide a new one. Tr. 144-45. Delores had the staff washing walls and ceilings as part of the deep cleaning process, but Massman told her to stop. Tr. 145-47. Massman refused to provide them the supplies they needed to get the motel up to standards. Tr. 154-55, 519. Massman confirmed all of this under cross-examination. Tr. 1292-1312.

The Fennerns' younger replacements received preferential treatment. Motel 6 gave them more desk clerk hours and an assistant maintenance man. Tr. 515, 1314. This enabled the Shearouses to clean the motel better and faster. Massman gave them a new carpet shampooer, Tr. 516, 1313, which enable them to deep clean rooms faster. Massman told the Fennerns on two occasions, while they were employed at the Idaho Falls motel, that he could replace them with college students. Tr. 180-82, 430. This testimony was unrebutted and unexplained.

Motel 6 replaced the Fennerns with Mike and Loree Shearouse. Jim and Delores were ages 60 and 58 respectively; Mike and Loree Shearouse were ages 35 and 49 respectively on the date of discharge and were less experienced than the Fennerns.

B. *HUTTINGER V. MOTEL 6.*

Motel 6 hired Art and Donna Huttinger as a motel management team on June 28, 1985. They managed the Pocatello motel. Their performance was always exemplary. They trained other managers and received annual merit pay raises. Their area managers agreed that the Huttingers were some of the best managers they had. Tr. 629-32, 983-84, Pl. Exh. 52. In April 1993, Area Manager Joseph Demarest thoroughly inspected the Huttingers' motel. They passed with flying colors. Demarest told them that although no one was supposed to get a "4" (on a 1-5 grading scale), he was going to give them a "4." Tr. 647-51, 1005-06. Regional Vice President Scott Griffith inspected the Huttingers' motel in February, 1993. He also gave them a "4." Tr. 632-40, D. Exh. 221.

On May 13, 1993 Doug Massman, the new area manager, inspected the Pocatello motel. He claims he found numerous key and security policy violations. However, he disclosed none of the claimed violations to the Huttingers, and the "action sheet" he prepared listed no violations. Tr. 652-64, Pl. Exh. 53. While at the motel Massman claims he heard from an unidentified desk clerk that the Huttingers were discriminating against Native Americans and using staff to work on their motor home, Tr. 1049-51, 1251-52, but he would lend such charges no

credence, nor even discuss them with the Huttingers, without written confirmation. Tr. 1224-27. When Massman left the motel the Huttingers had no idea that they were in violation of any Motel 6 policies. Tr. 663-64, 692, 819.

The Huttingers went on vacation on May 22, 1993. In their absence relief managers Jim and Aileen Malone took over the motel. Aileen Malone called Massman and told him of staff unrest and complaints about the Huttingers. Tr. 1060-61. Massman told her to have the staff write out their complaints, Tr. 1062, as he would lend them no credence unless they were in writing.

On May 25, 1993 Doug Massman met Scott Griffith in Phoenix to discuss the Huttingers. Tr. 929, 1237-39, D. Exh. 254. On that day they decided to fire the Huttingers for discriminating against Native Americans and for violating the security key policy. Tr. 928. Doug Massman had no documentary proof of the alleged violations at this meeting. Tr. 929-30, 1238.

Massman returned to the motel on May 27. Tr. 1063-71. He inspected the motel and prepared an action sheet listing key and security policy violations. Tr. 1219-20, Pl. Exh. 97. He met with the staff and solicited complaint letters against the Huttingers. Tr. 1067-71, 1254-56. Aileen Malone searched Donna Huttinger's personal files and found a memorandum which required desk clerks to subject Native American guests to close scrutiny on check in. Tr. 617, 689-90, 1071-72, D. Exh. 217. (The Huttingers stopped using this memorandum in 1990 when so directed by their area manager, Tr. 607-17.)

The Huttingers returned from vacation on June 2, 1993. Tr. 665. Massman called them in to a meeting and fired them. Tr. 673-76. Massman told the Huttingers he was firing them for discriminating against Native Americans and for violating the security key policy. Tr. 677-79; 689; Pl. Exhs. 75, p. 5; 99 and 254. He explicitly stated that there were no other reasons for discharge. Pl. Exh. 75 p. 5. The Huttingers had no warning of the discharge and no opportunity to respond to the charges against them. Tr. 675, 689, 816.

The Huttingers presented evidence at trial that the reasons for discharge were pretextual. They denied discriminating against Native Americans, Tr. 607-27; 803-05, and presented substantial evidence – including the testimony of former area manager Joseph Demarest – that their motel was in complete compliance with Motel 6's security policy. Tr. 632-36; 647-51; 984-98 and 1006.

At trial Motel 6 proffered additional reasons for discharge, including discrimination against *locals* (as opposed to Native Americans) in renting rooms, Tr. 1750-62, D. Exhs. 218 and 253, staff unrest, Tr. 1088-89 and D. Exh. 253, moldy bathrooms, Tr. 1408-09, 1755-56, staff working on the Huttingers' motor home, Tr. 1756, and untrimmed shrubs, Tr. 1075-79 and D. Exh. 253.

As in the termination of the Fennerns, neither Massman nor Griffith reviewed the Huttingers' personnel file (although it was available to them) nor discussed the Huttingers with their former area manager Joseph Demarest (although he was still working at Motel 6 in the same region) before making their termination decision;

nor did they apprise the Huttingers of the claimed violations prior to termination nor give the Huttingers any opportunity to respond.

At the time of discharge Art and Donna Huttinger were 68 and 55 years of age. Their replacements Jim and Aileen Malone were 45 and 43 years of age and were much less experienced than the Huttingers. Tr. 2057-58, 702-03.

III. MOTEL 6'S MISSTATEMENTS OF FACT AND FACTUAL OMISSIONS

Just as it did before the Ninth Circuit, Motel 6 here asserts that the facts as found by the district court [Pet. App. D] are the undisputed facts in this case. Motel 6 seldom cites to the record; rather, Motel 6 consistently cites to the district court's opinion to support its statement of facts. Motel 6 ignores facts which support plaintiffs' claims. Indeed, this was the gravamen of the appeal to the Ninth Circuit: whether or not there was substantial evidence in the record to support the jury's verdicts, notwithstanding the trial judge's interpretation of the record. Inasmuch as these are fact driven cases, it is imperative to point out the misrepresentations of fact and factual omissions in Motel 6's petition.

At page 3 of the petition Motel 6 misrepresents the status of the motel manager and assistant manager, stating: "The manager had the principal responsibility for the motel." At page 11 Motel 6 asserts that the motel manager was solely responsible for running the motel and the assistant manager was little more than a desk clerk. These assertions are false and unsupported by the record. The

Fennerns and Huttingers were hired as management teams. Tr. 61, 88-92, 382-83, 597. Motel 6 allowed them to choose who would be the manager and who the assistant manager. *Id.* Jim Fennern was originally a manager and paid a salary, while Delores was the assistant manager and was paid minimum wage. Tr. 88-92. They later switched. Tr. 382-83. Donna Huttinger started out as the assistant manager and later became the manager. Tr. 592. The assistant managers performed all of the duties of the managers. Tr. 389, 597. Motel 6 fired plaintiffs as motel management teams and replaced them with motel management teams. Tr. 1837-38.

Motel 6 argues here, as it did before the Ninth Circuit, that for purposes of determining discriminatory animus, only the ages of the managers – Delores Fennern and Donna Huttinger – and their replacements should be compared (there being a lesser disparity in ages) and the ages of the assistant managers – Jim Fennern and Art Huttinger – and their replacements should be ignored (there being a much greater disparity in ages). Motel 6 claims that this should be so because the manager, not the assistant, was responsible for the motel's management. This convenient argument ignores one salient fact, which was not lost upon the Ninth Circuit: the assistant managers ended up just as fired as the managers, regardless of how managerial responsibility was allocated.

At page 5 Motel 6 states: "The Huttingers were discharged for: (1) discrimination against Native Americans; (2) violations of Motel 6's safety and security policies; and (3) widespread employee complaints." This statement is incorrect. When Massman fired the Huttingers immediately after their return from vacation, he told

them there were only two reasons for termination: Failure to follow the security key policy, and discrimination against Native American guests. *See* Pl. Exh. 75. He specifically told them there were no other reasons for discharge. *Id.* At trial Motel 6 asserted additional reasons for discharge: Staff unrest, use of staff to work on the Huttingers' motor home, failure to trim shrubs, and failure to solve a mold problem in one of the bathrooms. Tr. 1749-62, 1084-1089, 1261-66 and D. Exh. 253. These reasons for discharge were never disclosed to the Huttingers before litigation began. Tr. 688-89. Motel 6 was at no time consistent in its reasons for discharge, first telling the Huttingers one thing; then stating another thing in internal documents; and finally asserting yet another constellation of reasons for discharge at trial.

At page 5 Motel 6 states:

> While the Huttingers were on vacation, the relief manager at the motel the Huttingers managed, Aileen Malone, contacted area manager Massman concerning Malone's discovery that the Huttingers were discriminating against Native Americans. (App., *infra*, 46a, 48a). Massman initially discussed the matter with Regional Vice President Griffith. Tr. 1079. Griffith directed Massman to go immediately to the Huttingers' motel and conduct an investigation. *Id.*

This is incorrect. Aileen Malone told Massman of staff unrest and complaints about the Huttingers. Tr. 1060-61. Massman claims that he heard about discrimination against Native Americans on his first visit to the motel on May 13, 1993 but would lend the charge no credence until he had documentary proof. Tr. 1049-51, 1224-27 and

1251-52. Massman did not "immediately" go to the Huttingers' motel to investigate. Rather, on May 25, 1993 Massman and Griffith met in Phoenix to discuss the Huttingers. Tr. 929, 1237-39 and D. Exh. 254. They decided to fire the Huttingers for discriminating against Native Americans and for violating the security key policy. Massman had no documentary proof of the alleged violations at this meeting. Tr. 929-30, 1238. Thereafter Massman returned to the motel on May 27, 1993 and obtained documents to support the termination decision by soliciting complaint letters against the Huttingers from staff, Tr. 1067-71, 1254-56, and by searching Donna Huttinger's personal files to discover a discriminatory memorandum (which the Huttingers had ceased using in 1990). Tr. 1071-72, 617, 689-90 and 607-17, D. Exh. 217.

At page 6 Motel 6 states: "The district court found that the Huttingers did not rebut record evidence that their memoranda for desk clerks that discriminated against Native Americans was still in effect three years after their previous area manager, Bob Williams, instructed them to cease using it." This is a factual error on the part of the district court. Donna Huttinger testified that they stopped using this memorandum in 1990 when so directed by their area manager. Tr. 607-17. She further testified that Aileen Malone could only have found a copy of this memorandum by searching through her personal files. Tr. 1071-72, 617, 689-90.

At page 7 Motel 6 states: "The district court observed that Malone and Jensen were not employed by Motel 6 at the time of the trial and were thus disinterested witnesses." Again this was error on the part of the district

court. The jury was free to reject Teresa Jensen's testimony as she clearly had her own agenda. She felt Donna Huttinger had abused her and was using the trial to exact a measure of revenge. Tr. 1623. Moreover, Aileen Malone was not a disinterested witness because she was interested in relocating to Idaho and taking over the Huttingers' Pocatello motel. Pet. App. A, p. 9a, Tr. 1417-18.

At page 8 Motel 6 asserts that the Huttingers acknowledged a violation of the security key policy by failure to utilize "blue tags." Motel 6 omits to mention that prior to the termination, Scott Griffith stated that the status of the blue key tags was "OK," Tr. 1849-50, D. Exh. 221; that Massman listed no key policy violations following his inspection of May 13, 1993, Tr. 658-64 and 819, Pl. Exh. 53; omits to state that one month prior to Massman's May 13 inspection, former area manager Joseph Demarest thoroughly inspected the motel's adherence to the key and security policy and passed the motel with flying colors, Tr. 647-51, 1005-06; ignores the fact that the blue key tags had absolutely nothing to do with motel security, Tr. 807-12; 1039-40; 1277-1280; and ignores the fact that, regardless of whether the Huttingers were using the blue key tags they were, according to Doug Massman, doing exactly what they were supposed to do with respect to the motel's keys. Tr. 1280. The jury could have thus concluded that the "blue key tags violation" was a trumped up reason, insufficient to warrant discharge.

At page 8 Motel 6 states: "Judge Winmill observed that Art Huttinger did not dispute that he had ordered Motel 6 employees to work on the Huttingers' personal motor home." Motel 6 omits to state that Doug Massman specifically stated that he was not relying upon this as

grounds for discharge. Pl. Exh. 75, p. 5. Motel 6 did not assert this as a grounds for discharge until trial. (Motel 6 did not assert an after-acquired evidence defense in either case.)

At page 9 Motel 6 states: "Six months later, *as part of their regular inspection program*, Massman and Griffith inspected the Fennerns' motel while the Fennerns were on vacation." (Emphasis added.) This is false. This inspection was unprecedented; the Fennerns' motels had never before been inspected in their absence. Tr. 188-89. In any event the portion of the transcript to which Motel 6 cites (Tr. 1135) does not state that this inspection was part of the Motel 6 regular inspection program.

At pages 9 and 10 Motel 6 discusses the inspection which took place on January 6, 1994 in the Fennerns' absence. Motel 6 fails to state that Massman and Griffith made their decision to terminate the Fennerns on January 6, 1994, without consulting the Fennerns. Tr. 1153.

At page 10 Motel 6 states: "The Fennerns were discharged for (1) failing a motel inspection; (2) improperly checking references before hiring a desk clerk; and (3) leaving for vacation with Room 114 at their motel 'down' (unrentable)." Motel 6 fails to disclose that when Massman told the Fennerns they were fired, he gave them *five* reasons for discharge. Pl. Exh. 24. The two additional reasons for discharge did not arise until January 17, 1994. Tr. 206, 215. Notwithstanding Massman's deposition testimony that at least one of the latter two reasons was a definite and serious reason for discharge, Tr. 1471-75, he recanted at trial and admitted that the latter two reasons were false. Tr. 1159-64, 1471-78.

At page 10 Motel 6 states: "Loree Shearouse, who succeeded Delores Fennern as manager, thoroughly cleaned the motel in six months, despite her lack of experience." This statement is false. It took Loree Shearouse a full year to clean the motel. Tr. 1321-26. Motel 6 gave the Shearouses staff and equipment to assist them which Motel 6 did not give to the Fennerns. Tr. 515-16, 1313-14. Most importantly, the Shearouses were standing on the Fennerns' shoulders, and took advantage of the Fennerns' six month, 10 to 14 hours a day, 7 days per week effort to clean the motel.

At page 10 n.7, Motel 6 asserts that the only direct evidence of discriminatory intent was Massman's statement that he could replace the Fennerns with college students at a lower wage. Motel 6 asserts that Jim Fennern admitted the statements were made at least six months before discharge. This assertion is a half truth. Delores Fennern testified that in October 1993, three months prior to discharge, Massman twice said that he could replace them with college students. Tr. 180-82, 430. Massman never denied or explained the statement. The district court ignored this testimony, as does Motel 6.

At page 11 Motel 6 states that plaintiffs had represented to the court that they would put on evidence of a pattern and practice of age discrimination. "On that basis, the district court permitted consolidation." The district court at no time prior to trial stated that this was the basis for the court's decision to consolidate. To the contrary, the district court stated, citing *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995): "It appears that evidence of age discrimination against other Motel 6 employees, including the Fennerns, is relevant to the issue of the motive or

intent behind the Huttingers' termination." Record 135 p. 18, Record 147 p. 21.

At page 12 Motel 6 correctly states: "Later, just before trial, plaintiffs announced that they did not intend to introduce pattern and practice evidence." Motel 6 omits to state that at that juncture, Motel 6 failed to move to separate the trials. Tr. 49-53.

At page 12 Motel 6 correctly states: "In their closing argument to the jury, however, the plaintiffs contended that the two cases presented the same pattern of Motel 6 conduct." Plaintiffs did in fact argue that there was a pattern of conduct on the part of Motel 6:

- Plaintiffs were older motel management teams;
- Plaintiffs were long term employees with excellent work records;
- The same decision makers were involved in each termination;
- The decision makers waited until plaintiffs were on vacation and furtively inspected their motels in their absence;
- The decision makers, both of whom were new to the region, did not bother to look at plaintiffs' personnel files, nor consult with plaintiffs' former area manager, before making their termination decisions;
- Plaintiffs had no prior warnings of any violations or that they were about to be terminated. Plaintiffs had no opportunity to respond to the charges against them;

- Motel 6 used shifting and pretextual reasons in each case to justify its termination decision;

- Motel 6 replaced plaintiffs with substantially younger, less experienced and lower paid management teams;

- The district count recognized that the only difference in the cases was the pretextual reasons for discharge, *See* Pet. App. D, p. 38a: "The only area in which the Fennern and the Huttinger cases significantly differ is in Motel 6's proffered reasons for discharge."[1]

Plaintiffs at no time argued that there was a "pattern and practice" of discrimination at Motel 6. "Pattern and practice" is a term of art describing a theory of proof in a disparate treatment case. It is in essence an allegation that discrimination is the employer's standard operating procedure. *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299 (1977).

At page 12 Motel 6 asserts "Upon learning that the plaintiffs abandoned their pattern and practice case, the district court refused to permit Motel 6 to introduce statistical evidence on its hiring and discharge patterns to

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[1] The district court later said: "The similarities regarding the age differential of the plaintiffs and their replacements, the temporal proximity of the firings, and the fact that the firing occurred subsequent to the plaintiffs' vacations pale by comparison to the substantial differences in the reasons for discharge proffered by Motel 6." Pet. App. D, p. 63a. The Court of Appeals gave this reasoning no credence whatsoever. Did the district court really expect Motel 6 to use the same reasons for terminating both the Fennerns and the Huttingers?

demonstrate there was no statistical support for any practice of age discrimination." This is a misstatement of the record. Motel 6 voluntarily withdrew its statistical evidence, Tr. 49-53, and at no time offered this evidence during the course of trial nor made an offer of proof.

IV. WHY THE PETITION FOR WRIT OF CERTIORARI OUGHT NOT BE GRANTED.

A. MOTEL 6 ASKS THIS COURT TO REVIEW FACTUAL FINDINGS.

Supreme Court Rule 10 states in part: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The basis for Motel 6's petition is the assertion that the district court's factual findings are entirely correct and that the Ninth Circuit's factual findings are entirely incorrect. Motel 6 asserts now, as it has throughout the appellate process, that the district court's factual findings are unimpeachable. This, of course, was the primary issue on appeal – were the district court's factual findings supported by the record. The Ninth Circuit Court of Appeals concluded that there were numerous facts in the record which the district court either ignored, or upon which it was simply mistaken, and that there was ample evidence in each case to support the jury's verdict.

A review of Motel 6's petition reveals that the ostensible "split in the circuits" on the "pretext plus" issue (see discussion below) is merely a ploy to induce this Court to review purely factual issues. After identifying the split in

the circuits on the "pretext plus" issue of law, the petition states:

> In the instant case, the Ninth Circuit reversed the district court's ruling granting JAML (and a conditional new trial) in *Huttinger*, and a new trial in *Fennern*, **despite that the evidence in the record showed that Motel 6's reasons for discharging the Huttingers and Fennerns were not pretextual** and in the absence of direct evidence that Motel 6 was motivated to discharge the Huttingers because of their age.

Petition for a Writ of Certiorari, p. 15 (emphasis added). The remainder of the petition is nothing more than Motel 6's rehashing of the evidence and Motel 6's repeated claims that the evidence did not support the jury's disbelief of the proffered reasons for discharge. *Id.* at 16-17. In short, were this Court to grant the petition, it would be presented with nothing more than a review of the factual record, not any significant legal issues.

B. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

Motel 6 asserts that the Ninth Circuit Court of Appeal's decision is contrary to decisions of this Court, in that the Ninth Circuit should have affirmed judgment as a matter of law where there was no direct evidence that defendant was motivated to discriminate against plaintiffs because of age. The Ninth Circuit Court of Appeals followed this Court's holding in *St. Mary's Honor Center v.*

Hicks, 509 U.S. 502 (1993) that "rejection of the defendant's proffered reasons [for discharge], will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, *no additional proof of discrimination is required.*" 509 U.S. at 511 (emphasis added). In the instant case, there was substantial evidence that Motel 6's reasons for discharge were pretextual. This was sufficient to raise an issue of fact for the jury and permit the jury to conclude the ultimate fact of intentional discrimination.

Petitioner's reliance upon this Court's grant of certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, is misplaced. In *Reeves*, the trial court denied a motion for judgment as a matter of law in an age discrimination case, and the jury rendered a verdict in plaintiff's favor. The Fifth Circuit Court of Appeals reversed on the grounds that, although the plaintiff presented sufficient evidence that defendant's proffered reasons for discharge were pretextual, he was required to submit *additional* direct evidence of discriminatory animus. (*Petition for Writ of Certiorari* No. 99536, App. A, p. 8a). The Fifth Circuit thus aligned itself with the minority of circuits that requires "pretext plus" to prove age discrimination.

In the case at bar the trial court *granted* the defendant's renewed motion for judgment as a matter of law based on the same "pretext plus" standard the Fifth Circuit applied in *Reeves*. On appeal, the Ninth Circuit followed the clear holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) that upon rejection of the proffered reasons for discharge, *"no additional proof of discrimination is required."* 509 U.S. at 511 (emphasis added) (citation and internal quotations omitted). *See Motel 6 v.*

Huttinger/Fennern, Petition for a Writ of Certiorari, Pet. App. A, p. 9a (*citing Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) *and St. Mary's Honor Center*, 509 at 511). The Ninth Circuit's interpretation of *St. Mary's Honor Center* is consistent with the majority of circuits. *See Sheridan v. E.I. DuPont De Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996) (and numerous cases cited therein), *cert. denied*, 521 U.S. 1129 (1997); and *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997) (and numerous cases cited therein), *cert. denied*, 522 U.S. 1045 (1998).

Because the Ninth Circuit's decision in the instant case follows *St. Mary's Honor Center v. Hicks*, no genuine issue of law is here presented. If this Court chooses to reverse *Hicks* and its progeny, and turn the tide of the majority of circuits which are in harmony with *Hicks*, *Reeves* is the case with which to do so, not the case at bench.

C. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED JURISDICTION OVER THE *FENNERN* CASE.

Motel 6 asks this Court to grant certiorari in *Fennern* on jurisdictional grounds, claiming the district court improperly certified the case for appeal because it failed to find a "controlling issue of law" under 28 U.S.C. 1292(b). The district court's analysis is puzzling, but does not preclude the Court of Appeals from exercising jurisdiction. In its Memorandum Decision and Order (Pet. App. D, p. 27a) granting a new trial in *Fennern*, the

district court clearly relied upon the "pretext plus" theory as controlling law in reaching its decision. The district court stated:

> The Fennerns simply did not prove that age discrimination was the "real reason" for their discharge, as they were required to do by the Supreme Court in *St. Mary's* and by the Ninth Circuit's implementation of the *St. Mary's* decision.[22]

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[22] The Court recognizes that the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and the Ninth Circuit's decision in *Nidds v. Schindler Elevator Corporation*, 113 F.3d 912 (9th Cir. 1997), suggest that the *prima facie* case, coupled with evidence from which the jury could conclude that the reasons for discharge were pretextual, may be sufficient to defeat summary judgment or a Rule 50(b) motion. However, an alternative, and better view, of those decisions is that the trial court can still assess whether that combination gives rise to a reasonable inference of discrimination which would justify a jury in returning a verdict for the party claiming discrimination. On the other hand, it seems clear that the reasonableness of the jury's inference of discrimination may be properly assessed in the context of a Rule 59 motion for new trial.

Pet. App. D, pp. 62a-63a. In its Order of Certification (Pet. App. C, p. 16a) the district court admitted that the "pretext plus" theory was a legal question about which there is substantial grounds for difference of opinion. Pet. App. C, p. 22a. The district court then denied that it was a "controlling" question, *Id.*, yet granted the Order of Certification. This inconsistency was not lost upon the Court of Appeals, which treated the "pretext plus" issue as a

controlling issue of law. The Court of Appeals stated: "We reject the district court's unsupported 'alternative and better view' for deciding to grant a new trial." Pet. App. A, at 11a.

Motel 6 bases its argument on *In Re Cement Anti-Trust Litigation*, 673 F.2d 1020 (9th Cir. 1982), in which the Ninth Circuit rejected case law from other circuits which defines "controlling questions of law" as including questions which, if resolved on appeal, would "appreciably shorten the time, effort, or expense of conducting a lawsuit . . . " *Id.* at 1027 (*citing Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755-56 (3rd Cir. 1974); *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961)). *See also* 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3929 (1977). Here, although the district court ostensibly did not find that the Fennern appeal presented a "controlling" issue of law, it certified the appeal based on the very considerations that *Katz*, *Hadjipateras*, and *Wright and Miller* hold constitute a controlling issue of law. (Pet. App. C, p. 25a.). Indeed, the Ninth Circuit has itself found a controlling issue of law based upon considerations of time and expense. *See Kay v. Kuehner*, 84 F.3d 316, 139 (9th Cir. 1996) ("We agree with the district court that an order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter.").

There is no dearth of law to support the Ninth Circuit's implicit conclusion that this case involved a "controlling" question of law. Having clearly concluded that the district court was correct in certifying the appeal, the Ninth Circuit was *required* to affirm that decision,

"although [the district court] relied upon a wrong ground or gave a wrong reason." *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (*quoting Helvering v. Gowran*, 302 U.S. 238, 245 (1937)). The Ninth Circuit's conclusion that this appeal presented a controlling question of law could have been based on reasoning similar to that in *Kay v. Kueher, Katz, Hadjipateras*, and *Wright and Miller, supra*. The Ninth Circuit's acceptance of the appeal could also have been based on the conclusion that, the district court's assertion to the contrary notwithstanding, the "pretext plus" issue was the controlling legal question on which the district court's decision turned. Pet. App. D, pp. 62a-63a. In either event, the Ninth Circuit had virtually unfettered discretion to permit or deny the appeal. *See In Re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990); *Gallimore v. Missouri Pac. R.R.*, 635 F.2d 1165, 1168-69 n.4 (5th Cir. 1981); 16 C. Wright & A. Miller, *Federal Practice and Procedure*, § 3929, at 141 (citing S. Rep. No. 2434, 85th Cong. 2d Sess.1958)).

Most importantly, the purpose of the district court's "screening" function has been met here. In describing such purpose, this Court relied upon the following statement from Congress in enacting Section 1292(b):

> . . . Requirement that the Trial Court certify the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases . . . [Avoidance] of ill-founded

> applications in the Court of Appeals for piecemeal review is of particular concern. If the consequence of change is to be crowded appellate dockets as well as any substantial number of unjustified delays in the Trial Court, the benefits to be expected from the amendment may well be outweighed by the lost motion of preparation, consideration, and rejection of unwarranted applications for its benefits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 n.24, 98 S.Ct. 2454, 2461 n.24 (1978) (quoting H.R. Rep. No. 1667, 85th Cong., 2d Sess., 5-6 (1958)).

In the case at bench, the district court was of the clear opinion that immediate appeal of the Fennern case would be of value, and gave a thorough explication of the reasons for its opinion. The Ninth Circuit agreed. The Ninth Circuit, perhaps more than any other circuit, is overburdened and understaffed, but nevertheless granted the petition. It obviously believed that hearing and deciding this appeal was very important, however congested its docket might have been. It would make little sense now to grant certiorari to protect the Ninth Circuit's docket for them, after the Ninth Circuit has already heard the appeal and issued its ruling.

Moreover, Motel 6 failed to raise this jurisdictional issue before the Ninth Circuit panel. The Ninth Circuit always has discretion to determine whether an order granting interlocutory appeal was improvidently granted. *United States Rubber Company v. Wright*, 359 F.2d 784 (9th Cir. 1966). Motel 6 obtained an unfavorable result before the Ninth Circuit and now for the first time raises the

jurisdictional issue. Motel 6 ought not be permitted to benefit from its "dog in the manger" tactics.

D. THE COURT OF APPEALS PROPERLY FOUND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL ON THE CONSOLIDATION ISSUE.

Motel 6 argues that the Court of Appeals failed to apply an abuse of discretion standard to the district court's finding that the cases were improperly consolidated. Motel 6 is mistaken. At part 2 of its analysis, "New Trial for the Huttingers and the Fennerns," the Court of Appeals clearly stated: "We review for an abuse of discretion a district court's grant of a new trial." Pet. App. A, p. 10a. Further, Motel 6's analysis of the facts is in error. Motel 6 asserts that the similarities between the two cases were inconsequential. Petition for a Writ of Certiorari at p. 24. This is directly contrary to the district court's finding that: "The only area in which the Fennern and the Huttinger cases significantly differ is in Motel 6's proffered reasons for discharge." Pet. App. D, p. 38a.

The flaw in Motel 6's analysis lies in its fixation upon the fact that Motel 6 gave different reasons for discharge of the Fennerns and the Huttingers. The district court mistakenly fixed upon this distinction as well. Pet. App. D, p. 63a. One would hardly expect Motel 6 to use the same reasons for discharge in each case. The relevant similarities between the cases are thus the "same patterns of furtive inspections followed by instant terminations." Pet. App. A, p. 11a. Again, Motel 6 asks this Court to

make a factual review. This is not grounds for granting a writ of certiorari. The Court of Appeals was correct in concluding that the cases were properly consolidated for trial, and that the district court abused its discretion in granting a new trial on this issue.[2]

V. CONCLUSION

Motel 6 bases its request for review on an erroneous view of the facts of record. Motel 6 asks this court to second guess the Ninth Circuit in its determination of the facts from the record. This is not a proper basis for granting a writ of certiorari. Motel 6 identifies no issue worthy of this court's exercise of its discretionary jurisdiction, and the petition should be denied.

DATED this 29th day of December, 1999.

Respectfully submitted,

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[2] A crucial fact which Motel 6 omits is that, at the time plaintiffs withdrew their pattern and practice theory of proof, Motel 6 should have moved to separate the trials. Motel 6 failed to do so because it made a tactical decision to proceed with the trials consolidated. This inconsistent position was not lost upon the Court of Appeals. Although not addressed in the written decision, it was the subject of sharp questioning during oral argument.

Supreme Court, U.S.
FILED
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No. 99-937

IN THE

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The questions in this case raise significant legal — not factual — issues. Respondents have not demonstrated how the principal issue here differs from that in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (certiorari granted, November 8, 1999). Neither have they been able to show how the court of appeals had jurisdiction to decide the interlocutory appeal in the *Fennern* case in the face of the district court's refusal to find that any issue in the case involved a controlling question of law as to which there is substantial ground for difference of opinion. If anything, Respondents' argument suggests the importance of this Court's clarifying the jurisdictional standard for interlocutory appeals. The Respondents' argument that the court of appeals correctly reversed the district court on the consolidation issue ignores that the court of appeals' principal basis for that reversal — the similarity of the reasons for the discharges in both cases — is not supported at all in the record, as Respondents tacitly admit.

1. Respondents contend that Motel 6 is asking this Court to review purely factual issues. (Resp. Br. 19). The salient facts are not in dispute, however. The issue before the Court is a legal one — whether Respondents' pretext evidence was sufficient to avoid judgment as a matter of law (JAML) or, alternatively, a new trial, where Respondents had no direct probative evidence that Motel 6 was motivated to discriminate against Respondents on the basis of age and their pretext evidence was weak. The district court acknowledged that under *St. Mary's Honor Center v. Hicks* 509 U.S. 502 (1993), Plaintiffs' prima facie case coupled with evidence from which the jury could conclude that Motel 6's reasons for the discharges were pretextual may be sufficient to defeat summary judgment or a JAML motion. (Pet. App. 62a, n.22). The district court thought, however,

that the "better view" of *St. Mary's* was that on a JAML or new trial motion a district court can still assess whether this combination gives rise to a reasonable inference of discrimination that would justify a jury verdict for the plaintiffs. (*Id.*) The issue here is thus the same as that presented in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (certiorari granted November 8, 1999). Indeed, the Respondents admit as much. (Resp. Br. 21-22).

The agreed facts in these cases are, if anything, less complex than those in *Reeves*. Respondents, Motel 6, and the court of appeals do not disagree, for example, that the Huttingers were discharged in part for discrimination against Native Americans and that there was no direct evidence of Motel 6's intent to discriminate against the Huttingers on the basis of age.[1] There is also no dispute that Motel 6 introduced documentary evidence, heavily relied upon by the district court, corroborating desk clerk Jensen's and Relief Manager Malone's testimony that the Huttingers were discriminating against Native Americans up until the time they left for vacation in 1993. (*See* Pet. 6-7). It is also undisputed that the Huttingers generally denied discriminating against Native Americans after 1990 but, like Respondents in their Opposition, offered no explanation why

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1. Respondents suggest that in the *Fennern* case there was direct evidence of Motel 6's discriminatory intent. (Resp. Br. "Questions Presented" No. 1). That evidence consisted of Massman's two passing remarks, made months before their discharge, that he could replace the Fennerns with "college students." The district court concluded that these ambiguous statements were insufficient direct evidence of Motel 6's intent to discriminate. (Pet. App. 36a). That conclusion is uniformly supported in the case law. *See, e.g., Nesbitt v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997).

a memorandum discriminating against Native Americans bearing Jenson's handwritten name, which Donna Huttinger admitted was in Huttinger's handwriting, was found in the Huttingers' motel file. Jensen was not hired until 1993. The "factual issues" in this case are not "issues" at all. There is no dispute about the essential facts, only about their legal significance.

Respondents contend that Malone was not a disinterested witness because she wanted to relocate to Idaho and to take over management of the Huttingers' motel. (Resp. Br. 14). Malone was interested in relocating to Idaho at the time of the Huttingers' discharge, however, *not* at the time of trial, which took place much later. (Tr. 1417-18). It is not disputed that at the time of trial, Malone was employed as a school bus driver and thus had no apparent bias in favor of Motel 6 based on her employment. (Tr. 1354-55). This effort to discredit Malone and Jensen, which was shared by the court of appeals (Pet. App. 9a), is in any event highly unusual in the context of a new trial motion. The district court judge saw the witnesses and is entitled to evaluate their credibility. *See, e.g., Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 540 (1958); *Harris v. Secretary, United States Department of the Army*, 119 F.3d 1313, 1318 (8th Cir. 1997); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2nd Cir. 1998). The scope of appellate review of the trial court's decision on a new trial motion is thus quite narrow. *Sulmeyer v. Coca Cola Company*, 515 F.2d 835, 851-52 (5th Cir. 1975).

Respondents dispute Motel 6's and the district court's (Pet. App. 56a, n.20, 33a-34a, n.4) reliance on the closeness in age of the managers in the two cases to find a relatively weak inference of age discrimination. (Resp. Br. 10-11). Like

the court of appeals (Pet. App. 11a), Respondents rely on the fact that the manager and assistant manager were hired and discharged as a team. (Resp. Br. 22). But the undisputed evidence also shows that the *responsibility* for running the motel was the manager's and that she was compensated accordingly. Thus, the official job description for manager states that the "manager is responsible for the implementation of the standards and procedures at the property . . . to ensure proper operations." (Pl. Ex. 29) (For the convenience of the Court we have reproduced the manager and assistant manager job descriptions as Appendix A to this brief). The manager is also responsible for "[s]upervision of all aspects of employment for motel staff. . . ." (*Id.*) The assistant manager "is an hourly employee who is assigned a variety of duties by the Manager, based on the daily demands of the property." (*Id.*) Among these, he must "[h]andle duties of desk clerk as needed." (*Id.*)

2. Respondents' state that Motel 6 "failed to raise . . . [the] jurisdictional issue before the Ninth Circuit panel." (Resp. Br. 26). In fact, on June 5, 1998, prior to the time the Fennerns' 28 U.S.C. § 1292(b) petition was heard by the Ninth Circuit's motions panel, Motel 6 timely filed an 18-page brief in opposition, raising the same jurisdictional issues presented to this Court. (For the convenience of the Court, we attach to this brief excerpts from the Ninth Circuit's docket sheet as Appendix B).[2]

Respondents contend that, even though the district court specifically found that an interlocutory appeal of any individual question of law was "unwarranted" (Pet. App.

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2. Judge Reinhardt sat on both the motions panel and the merits panel. (Pet. App. 2a, 15a).

25a), the district court really found that the "pretext plus" issue presented a controlling question because it certified the case on the basis that review now could shorten the time, effort, and expense of litigating the case. (Resp. Br. 24-25).

For three reasons, Respondents are wrong. First, the district court's certification had nothing to do with the "pretext plus" issue. It was concerned that the question whether Motel 6 acted willfully would not be submitted to the jury at a second trial, but that the court of appeals might later reverse the district court on that issue, requiring a third trial. (Pet. App. 24a-25a). Second, the statute speaks in the disjunctive. It requires the district court to find that there is a controlling question of law as to which there is substantial ground for difference of opinion *and* separately to find that an immediate appeal may "materially advance the ultimate termination of the litigation." (28 U.S.C. § 1292(b)). To import satisfaction of the "materially advance" requirement into the "controlling question" requirement would make the controlling question requirement superfluous in those cases where the "materially advance" requirement was satisfied. Congress indicated no such disposition to do so.

Third, Respondents' cases are of no help in this new trial case. In *Kay v. Koehner*, 84 F.3d 316, 319 (9th Cir. 1996) the district court had specifically found that the case involved a controlling question of law and the court of appeals agreed that where the issue is whether the district court has power to decide the case that is a controlling question. Plainly that is not our case. In *Gallimore v. Missouri Pacific Railroad Co.*, 635 F.2d 1165, 1168-69, n.4 (5th Cir. 1981), the court of appeals assumed jurisdiction was proper; there was no dispute concerning what was a controlling question of law. The same is true of *In re Convertible Rowing Exerciser*

Patent Litigation, 903 F.2d 822 (Fed. Cir. 1990) and of *Hadjipateras v. Pacifica S.A.*, 290 F.2d 697 (5th Cir. 1961). If, in fact, Respondents are right that some courts are using a favorable finding on the "materially advance" requirement to satisfy the "controlling question" requirement, that simply serves to demonstrate that there is a split in the circuits which this Court should resolve. (*See* Pet. 20-21, citing cases from the Seventh and Eighth Circuits.)

Finally, Respondents' "water over the dam" argument that the Ninth Circuit has already heard the cases (Resp. Br. 26) misses the critical jurisdictional point: If the Ninth Circuit never had jurisdiction to hear the case in the first place, the fact that it decided the case is irrelevant.

3. Respondents allege that Motel 6 decided not to move for separate trials when Plaintiffs announced that they would not attempt to show a pattern and practice of age discrimination through statistical evidence because Motel 6 made a tactical decision to try the cases together. (Resp. Br. 28, n.2). Motel 6 did not at any time choose to try the cases together. In fact, Motel 6 opposed consolidation of the cases at the time Respondents moved for consolidation. (C.R. 55). It did not move for separate trials again just prior to trial simply because it could not have foreseen that Respondents' withdrawal of their statistical evidence case just before the trial started would still allow Respondents to mislead the jury by arguing a pattern of age discrimination based just on the two cases, without Motel 6's having the opportunity for rebuttal grounded on its statistical evidence.[3]

3. Respondents state that Motel 6 "voluntarily" withdrew its statistical evidence. (Resp. Br. 19). The following exchange between the district court and Motel 6 counsel, however, indicates clearly (Cont'd)

In any event, a motion for separate trials is not, as Respondents suggest, a requirement for granting separate trials. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, "[t]he court, in furtherance of convenience or to avoid prejudice, . . . may order a separate trial . . ." Fed. R. Civ. P. 42(b). Thus, although Motel 6 opposed consolidation it was not required to do so. The district court could have acted on its own motion.

Respondents acknowledge but attempt to downplay the lack of similarity of the reasons given for the discharges of the Huttingers and Fennerns — the "district court mistakenly fixed upon this distinction. . . ." (Resp. Br. 27). The problem with Respondents' analysis is that court of appeals also "fixed" on the reasons for the discharge, mistakenly finding that they were "similar." (Pet. App. 63a). That erroneous finding was critical to the court of appeals' reversal of the district court. (*See* Pet. App. 11a).

(Cont'd)

that Motel 6 did not voluntarily withdraw this evidence; it merely stated its understanding that the court was going to exclude this evidence. The district court then proceeded to do exactly that:

MR. BARNES [Counsel for Motel 6]: If I understand how the evidence is going to play, this may eliminate the whole — all the statistical evidence.

THE COURT: Frankly, it would be my intention, I'm certainly not going to allow you to rebut statistical evidence that is not being offered. (Tr. 52).

CONCLUSION

For the foregoing reasons, and those presented in the Petition, the Court should grant Motel 6's petition for certiorari in these cases and reverse the court of appeals rulings on the issues presented here.

Respectfully submitted,

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APPENDIX

APPENDIX A — JOB DESCRIPTION FOR MANAGER AND ASSISTANT MANAGER — PLAINTIFF'S EXHIBIT 29

JOB DESCRIPTION

MANAGER

The manager is responsible for the implementation of the standards and procedures at the property as established by Motel 6 to ensure proper operations of the motel.

The following is a list of essential job functions. However, the manager may be required to perform other duties and responsibilities as required by the job and Management.

ESSENTIAL JOB DUTIES

1. Supervision of all aspects of employment for motel staff, to include all aspects of hiring, training, supervising, scheduling, employee relations, and termination of all employees.

2. Responsible for ensuring that the safety and security program is maintained and complied with in accordance with company Safety & Security Manual.

3. Ensuring positive guest relations, which may involve handling inquiries regarding motel and local amenities, as well as assisting guests with problems pertaining to their stay at the property.

4. Maintain property books, including daily bookkeeping and bank deposits.

5. May be required to perform duties of desk clerk, headhousekeeper, maintenance, or other supervisory staff as needed due to special circumstances and as requested by Management.

PHYSICAL REQUIREMENTS

The following requirements may change depending on the individual property and according to the confines of the work space available for any required task.

1. As the manager must perform any of the duties from the various property positions in some circumstances, they should meet the same physical requirements noted for those positions.
2. Stand, walk, or sit alternately depending on specific daily demands. Estimate 50% of the time is spent on feet and 50% sitting at desk.
3. Firm and simple grasping are required when performing most duties.
4. Have need (up to 50% of the time) to perform the following physical activities: bend/stoop/squat; crawl; climb stairs/ladders; kneel; push or pull; twist torso; reach above shoulder level.
5. Lifting and carrying requires handling of bulk supplies weighing up to 90 pounds. Typically, the maximum weight carried is 50 pounds on an average of twice daily for distances up to 40 feet.
6. Operation of automobile.
7. Can include any duties in all other motel job descriptions on a temporary basis as needed to ensure proper operations of motel, so any physical requirements noted on those descriptions must be met for the manager position.

Appendix A

JOB DESCRIPTION

Assistant Manager

The Assistant manager is an hourly employee who is assigned a variety of duties by the Manager, based on the daily demands of the property.

The following is a list of essential job functions. However, employees may be required to perform other duties and responsibilities as required by the job or requested by management.

ESSENTIAL JOB DUTIES

1. Assist with guest inquiries and problems pertaining to the guests' stay at the motel, in order to ensure positive guest relations.
2. Responsible for ensuring that safety and security program is maintained and complied with in accordance with Company Safety & Security Manual.
3. Assist manager with maintenance of property books, including daily bookkeeping and bank deposits.
4. Handle duties of desk clerk as needed.
5. May handle any duties from all other motel job descriptions as needed or at the direction of Manager, in order to maintain proper operation of motel.

PHYSICAL REQUIREMENTS

The following requirements may change depending on the individual property and according to the confines of the work space available for any required task.

Appendix A

1. As the assistant manager must perform any of the duties from the various property positions according to the daily demands, they should meet the same physical requirements noted for those positions.

2. Firm and simple grasping are required when performing most duties.

3. Stand, walk or sit alternately depending on specific daily demands. Estimate 50% of the time is spent on feet and 50% sitting at desk.

4. Have need (up to33% of time) to perform the following physical activities:
   a. bend/stoop/squat
   b. crawl
   c. climb stairs/ladders
   d. kneel
   e. push or pull
   f. twist torso
   g. reach above shoulder level

5. Lifting and carrying of bulk supplies weighing up to 90 pounds may occur occasionally. Typically, lifting involves a maximum weight carried of 50 pounds (e.g., shampooer, container or detergent), on an average of twice daily for distances up to 40 feet.

6. Operation of automobile.

APPENDIX B — EXCERPT FROM NINTH CIRCUIT DOCKET ENTRIES

Case: Fennern, et al v. Motel 6 Operating LP, et al
Nature of suit:
Filed On: 5/28/98
Appeal From: District of idaho (Boise)

Summary

	Lower Court Information:
District:	0976-1
Case:	CV-95-00121-BLW
Presiding Judge:	B. Lynn Winmill, District Judge
Date Order/Judgment	5/13/98
Fee Status:	Unknown

Docket

Date	Description
5/28/98	RECEIVED ON 5/26/98 ORIGINAL AND 4 PETITIONS TO APPEAL PURSUANT TO RULE 1292(b); served on 5/22/98 (MOATT) (vt)
6/5/98	Filed Appellee's answer in opposition to petition for permission to appeal; served 5/22/98. (MoAtt) [98-80387] (dl)
6/10/98	Order filed The petition for permission to appeal pursuant to 28 U.S.C. 1292(b) is granted. Within 10 days of this order, petr shall perfect the appeal pursuant to FRAP 5(d) (Procedurally Terminated After

Appendix B

Other Judicial Action; GRANTED Stephen R. REINHARDT, author; David R. THOMPSON.) (fax parties 11:15 am) (vt)